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No. 91-913-CFX
Status: GRANTED

Title: John R. Patterson, Trustee, Petitioner
v.
Joseph B. Shumate, Jr.

Docketed:
November 8, 1991

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Agee,George Steven

Counsel for respondent: Huennekens,Kevin R.

40 copies of pet rec'd 111291-1 retained 40 corr'd rec'd 120491 NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Nov 8 1991	G	Petition for writ of certiorari filed.
2	Dec 9 1991		Brief of respondent Joseph Shumate in opposition filed.
3	Dec 23 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Dec 26 1991		Reply brief of petitioner John Patterson filed.
5	Dec 31 1991		DISTRIBUTED. January 17, 1992
6	Jan 21 1992		Petition GRANTED.
			**
7	Jan 21 1992		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	Feb 11 1992		Record filed.
		*	Original proceedings U.S.Court of Appeals, Fourth Circuit and U.S.District Court,W.Dist.Virginia (1 Box)
9	Mar 4 1992		SET FOR ARGUMENT MONDAY, APRIL 20, 1992. (3RD CASE).
11	Mar 6 1992		Brief of petitioner John Patterson filed.
13	Mar 6 1992		Joint appendix filed.
		*	(Two Volumes)
15	Mar 6 1992	G	Motion of David B. Tatge, Trustee for leave to file a brief as amicus curiae filed.
10	Mar 11 1992		CIRCULATED.
17	Mar 20 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Mar 23 1992		Motion of David B. Tatge, Trustee for leave to file a brief as amicus curiae GRANTED.
21	Mar 30 1992	G	Motion of Hallmark Cards, Inc. for leave to file a brief as amicus curiae filed.
22	Mar 30 1992	G	Motion of Wal-Mart Stores, et al. for leave to file a brief as amici curiae filed.
20	Mar 31 1992	G	Motion of Eldon S. Reed for leave to file a brief as amicus curiae filed.
23	Mar 31 1992	G	Motion of Ronald J. Wyles, et al. for leave to file a brief as amici curiae filed.
24	Mar 31 1992	G	Motion of ERISA Industry Committee, et al. for leave to file a brief as amici curiae filed.
39	Mar 31 1992	G	Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae filed.
26	Apr 2 1992	G	Motion of Lincoln National Corporation for leave to file

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Entry	Date	Note	Proceedings and Orders
			a brief as amicus curiae filed.
38	Apr 3 1992	G	Motion of American College of Trust and Estate Counsel for leave to file a brief as amicus curiae filed.
18	Apr 6 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
19	Apr 6 1992	X	Brief of respondent Joseph Shumate filed.
27	Apr 6 1992	X	Brief amicus curiae of United States filed.
28	Apr 6 1992	G	Motion of American Society of Pension Actuaries for leave to file a brief as amicus curiae filed.
30	Apr 13 1992	X	Reply brief of petitioner John Patterson filed.
31	Apr 20 1992		Motion of Hallmark Cards, Inc. for leave to file a brief as amicus curiae GRANTED.
32	Apr 20 1992		Motion of Wal-Mart Stores, et al. for leave to file a brief as amici curiae GRANTED.
33	Apr 20 1992		Motion of Eldon S. Reed for leave to file a brief as amicus curiae GRANTED.
34	Apr 20 1992		Motion of Ronald J. Wyles, et al. for leave to file a brief as amici curiae GRANTED.
35	Apr 20 1992		Motion of ERISA Industry Committee, et al. for leave to file a brief as amici curiae GRANTED.
36	Apr 20 1992		Motion of Lincoln National Corporation for leave to file a brief as amicus curiae GRANTED.
37	Apr 20 1992		Motion of American Society of Pension Actuaries for leave to file a brief as amicus curiae GRANTED.
40	Apr 20 1992		Motion of Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae GRANTED.
41	Apr 20 1992		Motion of American College of Trust and Estate Counsel for leave to file a brief as amicus curiae GRANTED.
42	Apr 20 1992		ARGUED.

No. 91-918

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the antialienation requirement of 29 USC §1056(d)(1) included as "applicable nonbankruptcy law" under 11 USC §541(c)(2) or is "applicable nonbankruptcy law" limited to state spendthrift trust law?

2. Does the ERISA antialienation provision of 29 USC §1056(d)(1) qualify a bankruptcy debtor's interest in a qualified retirement plan as "property exempt under Federal law" under 11 USC §522(b)(2)?

3. If the antialienation provisions of 29 USC §1056(d)(1) either create a federal exemption under 11 USC §522(b)(2) or qualify as "applicable nonbankruptcy law" under 11 USC 541(c)(2), is there an enforceable public policy barring a debtor in bankruptcy from sheltering his interest in an ERISA qualified retirement plan over

which the debtor held significant dominion, control and revocation power?

11 USC §541(a)(1) of the Bankruptcy Code creates an estate of "all legal or equitable interests of the debtor" but excludes the debtor's interest in a trust which is subject to an enforceable restriction on its transfer under "applicable nonbankruptcy law" in 11 USC §541(c)(2). 11 USC §522(b)(2) of the Bankruptcy Code authorizes an exemption from the bankruptcy estate of "any property that is exempt under federal law." The Employment Retirement Income Security Act (ERISA), through 29 USC §1056(d)(1), requires all qualified retirement plans to contain an antialienation provision in the plan's trust agreement. Respondent was a participant in a qualified retirement plan, containing the antialienation provision required by ERISA, but he had the power to

terminate the plan at will and receive his plan interest free of the trust. The Courts of Appeal are in conflict as to whether ERISA excludes (or exempts) such an interest in a qualified retirement plan from a debtor's estate in bankruptcy.

LIST OF PARTIES

The parties are the Petitioner, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., and the Respondent, Joseph B. Shumate, Jr.

In the District Court proceedings, Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation; Roy V. Creasy, Trustee and Plan Administrator of the Coleman Furniture Corporation Pension Plan; William Mercer Meidinger and NCNB Financial Services, Inc. were named parties. None of these parties has an interest in the outcome of this proceeding, none participated in the case below in the Court of Appeals, and therefore, none are named as parties herein.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE, *Petitioner*,

v.

JOSEPH B. SHUMATE, JR., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, John R. Patterson, Trustee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on August 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 943 F.2d 362, and is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United States District Court for the Western District of Virginia is reported at 83 B.R. 404, and is reprinted in the appendix hereto, p. 18a, *infra*. The District Court also issued a Memorandum Opinion dated April 13, 1988, which has not been reported, but is reprinted in the appendix hereto, p. 47a, *infra*, and a Final Order on September 1, 1988, which is reprinted in the appendix hereto, p. 52a, *infra*.

JURISDICTION

The United States District Court for

the Western District of Virginia entered its decision March 1, 1988, with a Final Order on September 1, 1988, holding Respondent must turnover his pension interest to the Petitioner, his bankruptcy Trustee. See p. 18a, *infra* and 52a, *infra*.

Respondent appealed to the Court of Appeals for the Fourth Circuit which reversed the District Court in an opinion entered August 12, 1991. See p. 1a, *infra*. No petition for rehearing was sought, but the Fourth Circuit stayed its Mandate pending appeal to this Court by Order entered September 13, 1991. See p. 58a, *infra*.

The jurisdiction of this Court to review the judgment of the Fourth Circuit Court of Appeals is invoked under 28 USC §1254(1).

STATUTES INVOLVED

1. 11 USC §522(b)(2)(A), reprinted in the appendix hereto, p. 60a, *infra*;

2. 11 USC §541(c)(2), reprinted in the appendix hereto, p. 61a, *infra*;

3. 26 USC §401(a)(13)(A), reprinted in the appendix hereto, p. 62a, *infra*;

4. 29 USC §1056(d)(1), reprinted in the appendix hereto, p. 63a, *infra*; and

5. 29 USC §1144(d), reprinted in the appendix hereto, p. 64a, *infra*.

STATEMENT OF THE CASE

Coleman Furniture Corporation (hereinafter CFC) filed for bankruptcy under Chapter 11 of the Bankruptcy Code in November, 1982. Roy V. Creasy (hereinafter Creasy) was appointed Bankruptcy Trustee for CFC in February, 1983, when CFC's case

was converted to a Chapter 7 proceeding. In addition to his duties as Trustee in Bankruptcy for CFC, Creasy was appointed Plan Administrator of the Coleman Furniture Corporation Pension Plan (hereinafter CFC Plan). CFC established the CFC Plan in 1963 and maintained it as a qualified retirement plan under the Internal Revenue Code. The CFC Plan contained the antialienation clause required by 26 USC §401(a)(13)(A) and 29 USC §1056(d)(1).

Creasy brought an action in the United States District Court for the Western District of Virginia culminating in Court approval to terminate the CFC Plan. See *Creasy* v. *Coleman Furniture Corporation*, 763 F.2d 656 (4th Cir. 1985).

Of approximately 400 CFC Plan participants, all except Joseph B. Shumate, Jr., the Respondent (hereinafter Shumate), received their account benefits in

termination distributions from Creasy. The CFC Plan, upon satisfying payments to all plan participants, had a surplus which is a reversion payable to CFC.

Shumate filed for Chapter 11 bankruptcy protection on June 1, 1984, and was converted to a Chapter 7 proceeding on August 24, 1984. John R. Patterson, Trustee, the Petitioner (hereinafter the Trustee), was then appointed Shumate's Trustee in bankruptcy.

The Trustee, pursuant to 11 USC §542, filed an Adversary Proceeding in the United States Bankruptcy Court on April 24, 1987, for the turnover of Shumate's CFC Plan benefit to his bankruptcy estate. Shumate responded by filing a motion, invoking jurisdiction under 29 USC §1132 in an existing District Court civil action concerning the CFC Plan, to compel Creasy to pay the CFC Plan benefits over to him.

The Trustee intervened in the District Court action, into which the Adversary Proceeding was consolidated, and all matters relating to Shumate's CFC Plan interest were heard in that proceeding.

Shumate was Chairman of the Board of Directors, corporate President, and the majority shareholder of CFC from 1978 through at least February, 1983. Shumate has owned and controlled at least 96% of the issued and outstanding CFC stock from 1979 to the present as majority stockholder. Jt. Ap. Vol. I, p. 109, 110.

As CFC's majority stockholder, Shumate could replace the CFC Board of Directors at will. Jt. Ap. Vol. I, p. 131. The CFC Board of Directors could terminate the CFC Plan at will without cause. Jt. Ap. Vol. II, p. 290. The District Court found "therefore, Shumate could have terminated the plan at any time before the bankruptcy

and received not only his pension interest, but any excess funds not needed to satisfy the rights of other participants." See p. 23a, infra. Shumate "could have paid himself the reversion of any overfunded amount as a dividend on his stock." See p. 37a, infra.

Shumate, Creasy, and the Trustee entered into an Agreement and Agreed Order dated December 3, 1987, fixing Shumate's CFC Plan interest at $250,000.00. Jt. Ap. Vol. I, pp. 90-96. Under this Agreed Order, Creasy paid the $250,000.00 to the Clerk of the United States District Court for the Western District of Virginia, to be held in an interest bearing account.

The Trustee argued at trial that the CFC Plan interest was property of the bankruptcy estate under the broad reach of 11 USC §541(a): "all legal and equitable interest of the debtor in property." The

chief task for the District Court was to determine if Shumate could exclude that interest from property of the estate under the argument that the CFC Plan's alienation provision was an applicable nonbankruptcy law restriction on transfer under 11 USC §541(c)(2). If not, unless an exemption could be found under 11 USC §522(b), then the CFC Plan interest must be turned over to the Trustee. See p. 25(a), infra.

Citing the Fourth Circuit's decision in McLean v. Central States Pension Fund, 762F.2d 1204 (4th Cir.1985), as authority, the District Court Judge ruled that the Fourth Circuit had interpreted "applicable nonbankruptcy law" to mean state law. See p. 26a, infra, citing McLean, 762 F.2d at 1206, 1207. The District Court then reviewed Virginia spendthrift trust law and found spendthrift trusts are invalidated where a debtor exercises such control over

the trust as to (in effect) be both settlor and beneficiary by virtue of the power to terminate the trust. See p. 35a, infra.

Due to Shumate's pervasive control and revocation power over the CFC Plan and his interest in it, he was in effect settlor and beneficiary. Accordingly, the District Court held the pension interest was not excluded from Shumate's bankruptcy estate. Virginia public policy invalidated spendthrift trust protection in such circumstances.

The District Court also determined that the antialienation clause in the CFC Plan required by 29 USC §1056(d)(1) did not protect Shumate's interest as "exempt under federal law" within the context of the applicable Bankruptcy Code exemption provision, 11 USC §522(b)(2). Finding Virginia had opted out of the Bankruptcy Code's exemption scheme, the District Court

followed a line of Court of Appeals decisions holding ERISA was not intended by Congress to be a "federal exemption" under 11 USC §522(b)(2). See p. 44a, infra.

The Fourth Circuit, by a decision dated August 12, 1991, held that "applicable nonbankruptcy law" under 11 USC §541(c)(2) does include ERISA and reversed the District Court decision. Citing Anderson v. Raine (In Re Moore), 907 F.2d. 1476 (1990) as authority, the Court of Appeals ruled that the antialienation language required by 29 USC §1056(d)(1) is "applicable nonbankruptcy law" which acted to exclude Shumate's pension interest from his bankruptcy estate. In the Fourth Circuit's view, there was no public policy restriction permitted by ERISA regardless of the degree of control a debtor may have over his retirement plan interest. See p. 11a, infra. Having found the controlling

application of ERISA as applicable nonbankruptcy law under 11 USC §541(c)(2), the Fourth Circuit did not reach the 11 USC §522(b)(2)(A) exemption question. See p. 16a, <u>infra</u>.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision that "applicable nonbankruptcy law" includes ERISA, and is not limited to state spendthrift trust law, directly conflicts with many decisions of other Courts of Appeals, the legislative history of the Bankruptcy Code and public policy. An ancillary ground of decision deeming ERISA to create a federal exemption in bankruptcy also conflicts with

other Court of Appeals decisions, the legislative history of the Bankruptcy Code and public policy.

The crux of this case is whether a debtor in bankruptcy, who can control and cause the termination of his interest in a qualified retirement plan, can seek bankruptcy protection and avoid turnover of that interest to the trustee. The precise conflict lies in differing interpretations of the requirements of the Bankruptcy Code and ERISA. A multitude of Courts of Appeal, District Court and Bankruptcy Court decisions are in direct conflict over the questions represented by this case.

The Bankruptcy Code, by 11 USC §541(a), creates a bankruptcy estate of "all legal or equitable interests of the debtor in property" to be turned over to

the debtor's trustee for distribution to creditors. ERISA, by 29 USC §1056(d)(1), requires that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated". A similar provision is included in the Internal Revenue Code, 26 USC §401(a)(13)(A), relating to tax qualification for retirement plans.

Debtors, like the Respondent, argue such an antialienation provision contained in an ERISA qualified plan creates a restriction on transfer enforceable under "applicable nonbankruptcy law" under 11 USC §542(c)(2) so as to exclude the retirement interest as property of the bankruptcy estate. Debtors also contend the antialienation provision creates a federal law exemption under 11 USC §522(b)(2)(A) exempting a qualified retirement plan interest from the grasp of the bankruptcy

trustee.

Bankruptcy trustees, like the Petitioner, contend the Bankruptcy Code prevails over any apparent conflict with ERISA to include retirement interests as estate property. This argument is buttressed by the legislative history of the Bankruptcy Code which displays the intent of Congress that the phrase "applicable nonbankruptcy law" in 11 USC §541(c)(2) means only state spendthrift trust law. The legislative history and rules of statutory construction undergird the proposition that ERISA does not create an ERISA exclusion from the bankruptcy estate as to do so would render the Bankruptcy Code's exemption scheme in 11 USC §522(b) and (d) unnecessary and useless. The Courts of Appeal which affirm the Petitioner's viewpoint note the primacy of the Bankruptcy Code to include a

debtor's plan benefit in the estate under 11 USC §541(a) over any conflicting ERISA provision as 29 USC §1144(d) provides that ERISA does not modify or supersede other federal law.

I. Applicable nonbankruptcy law in 11 USC §541(c)(2) refers to state spendthrift trust law and was not intended by Congress to include ERISA.

The apparent conflict between the Bankruptcy and ERISA statutory directives has split the Courts of Appeal. Four Circuits have ruled that the Bankruptcy Code prevails and found through the legislative history of the Bankruptcy Code, that "applicable nonbankruptcy law" in 11 USC §541(c)(2) is meant to refer to state spendthrift trust law, and not other statutory enactments such as ERISA. Daniel v. Security Pacific National Bank,

771 F.2d. 1352 (9th Cir. 1985), cert. den. 106 S.Ct. 1199; Goff v. Taylor, 706 F.2d. 574 (5th Cir. 1983); Lichstrahl v. Banker's Trust, 750 F.2d. 1488 (11th Cir. 1985); Samore v. Graham, 726 F.2d. 1268 (8th Cir. 1985).

These four Courts of Appeal examined the legislative history of the Bankruptcy Code to conclude "Congress intended its reference to applicable nonbankruptcy law to exempt from the estate only those spendthrift trusts traditionally beyond the reach of creditors under state law." Goff, 706 F.2d at 582 and citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, reprinted in 1978 U.S. Code Cong. and Ad. News 5787, 5869. This evidence of Congressional intent to limit exclusions from the bankruptcy estate is confirmed by the specific inclusion of ERISA benefits in the Bankruptcy Code's exemption provision, 11

USC §522(d)(10)(E). These Courts of Appeal reasoned that Congress would not have specifically dealt with ERISA benefits as an exemption from the bankruptcy estate in 11 USC §522 if it had intended the 11 USC §541(c)(2) provision to create an ERISA exclusion thereby rendering the exemption provision superfluous. As the Fifth Circuit noted in Goff:

> We find that Congress did not intend to do ambiguously in Section 541 that which it clearly did not do directly in Section 522, although Section 522 explicitly addresses the extent to which other "Federal law" and retirement benefit exemptions would be recognized. 706 F.2d at 582.

Even the most scholarly opinion holding ERISA creates an omnibus federal exemption under 11 USC §522(b)(2)(A), accepts the proposition that 11 USC §541(c)(2) does not include ERISA as "applicable nonbankruptcy law." In Re

Komet, 104 B.R. 799, 816 (W.D. Texas, 1989).

Accordingly, in the Fifth, Eighth, Ninth and Eleventh Circuits, a debtor's qualified retirement benefit is included as property of the bankruptcy estate under 11 USC §541(a) with the matter of whether some or all of the Debtor's interest is exempt being determined under 11 USC §522.

The Fourth Circuit broke with the other Courts of Appeal in Anderson v. Raine, (In Re Moore), 907 F.2d 1476 (4th Cir. 1990), holding that ERISA prevailed over any perceived conflict with the Bankruptcy Code in that "applicable bankruptcy law" under 11 USC §541(c)(2) did include ERISA and was not restricted to state spendthrift trust law. Accordingly, a debtor's interest in a qualified retirement plan was to be excluded from the bankruptcy estate on the grounds that the

plan's antialienation provision (required by ERISA) was an effective restriction on transfer under 11 USC §541(c)(2).

Although the Fourth Circuit apparently adopted the Goff line of cases, interpreting 11 USC §541(c)(2) to mean state law, in McLean v. Central States Pension Fund, 762 F.2d 1204 at 1206, the Anderson court chartered a different course discounting the conclusions from the Bankruptcy Code's legislative history drawn by the other Courts of Appeal.

> "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of 541(C)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law." 907 F.2d at 1477.

No appeal was taken from the Anderson v. Raine decision.

The Sixth Circuit Court of Appeals adopted the viewpoint of the Fourth Circuit in its decision In Re Lucas, 924 F.2d 597 (6th Cir. 1991). An appeal was taken but certiorari was denied. 111 S.Ct. 2275.

The Fourth Circuit followed its Anderson principle in the case at bar to hold that Shumate's CFC Plan interest was excluded from his bankruptcy estate under 11 USC §541(c)(2). The Court of Appeals held the ERISA required antialienation provision in the CFC Plan restricted the plan interest as "applicable nonbankruptcy law" so as to exclude it from Shumate's bankruptcy estate. In the Fourth Circuit's view, this is the case regardless of the control, including the power to terminate, held by the debtor over his qualified plan interest. See p. 12a, infra.

The debtors in Anderson and Lucas had no control over the retirement plan in

which each was a participant. They were basically rank and file workers with no ability to terminate their plan interest. By contrast, Shumate as majority stockholder, director and corporate president, could direct at any time that the CFC Plan be terminated and thereupon receive his plan interest and the value of the plan reversion to CFC free of any trust. This power of revocation under Virginia law, as interpreted by the District Court, vitiates the protection of the antialienation provision of the CFC Plan, as to Shumate, since that power essentially makes Shumate settlor and beneficiary of his trust.

The Fourth Circuit did not address the argument that finding a comprehensive ERISA exclusion from the bankruptcy estate by deeming ERISA to be "applicable nonbankruptcy law" under 11 USC §541(c)(2)

is inconsistent with the treatment of ERISA benefits as an exemption under 11 USC §522(b)(2) (thereby rendering 11 USC §522(d)10)(E) unnecessary). Similarly, the Fourth Circuit did not address the argument that ERISA's noninterference with other federal law provision (29 USC §1144(d) gives the Bankruptcy Code's definition of property of the estate pre-emption over any derivative ERISA protection based on the CFC Plan's restriction on transfer.

The result of the <u>Anderson</u> and <u>Shumate</u> decisions places debtors, bankruptcy trustees, and qualified retirement plans in irreconcilable and conflicting positions depending upon the state or even district of residence. In some districts a debtor's control over his retirement benefits, no matter how great, permits him to exclude those assets from the reach of his bankruptcy trustee. Yet in a neighboring

district, a similarly situated debtor must surrender this asset to the Trustee for the benefit of his creditors. Had the Shumate case arisen in the Fifth, Eighth, Ninth or Eleventh Circuits, the CFC Plan interest would have been directed to the Petitioner as Trustee.

Thousands of bankruptcy trustees, debtors, and the fiduciaries and beneficiaries of retirement plans are now subject to conflicting rules, persistent litigation and unknown fiduciary liability with the results on the same facts absolutely contrary from one district to another. The multitude of litigation is vast.

In the Fourth Circuit, a bankruptcy trustee who now litigates the turnover of a debtor's retirement plan interest could be subject to sanctions under Rule 11 while an identically situated trustee in the

Fifth Circuit may be surcharged for violating his fiduciary duty if he <u>fails</u> to litigate the turnover of an identical debtor's retirement plan interest. Similarly, the fiduciary of a retirement plan must now treat the interest of identical debtor/participants' plan interests differently and at great risk. The plan fiduciary who pays over a debtor's plan interest to a bankruptcy trustee in the Fourth Circuit could be subject to a personal surcharge for so doing, while the same fiduciary of the same plan in the Fifth Circuit could be in contempt of Court or surcharged if he <u>failed</u> to pay over the debtor's interest to the bankruptcy trustee.

Any beneficiary of a qualified retirement plan who contemplates bankruptcy is well advised to change legal residence to a district following the <u>Shumate</u>,

Anderson and Lucas cases. While some forum shopping by debtors looking for more favorable state exemptions occurs, in the area of retirement benefits the cause is solely the inconsistency of federal law from district to district.

The Fourth Circuit's decision that ERISA is "applicable nonbankruptcy law" under 11 USC §541(c)(2) which restricts the transfer of Shumate's CFC Plan interest should be reversed. Congress intended to restrict "applicable bankruptcy law" to state spendthrift trust law and crafted a careful exemption scheme in 11 USC §522 to cover retirement benefits. The Shumate decision erroneously ignores the legislative history of 11 USC §541(c)(2) and violates the rules of statutory construction by rendering 11 USC §522(d)(10)(E) superfluous.

II. ERISA does not create a federal exemption in bankruptcy under 11 USC §522(b)(2)(A).

Should the Supreme Court reverse the Fourth Circuit's decision below by determining its interpretation of "applicable nonbankruptcy law" in 11 USC §541(c)(2) was incorrect, the dilemma of Bankruptcy trustees, debtors and retirement plan fiduciaries and beneficiaries would be little ameliorated without also determining whether ERISA creates an omnibus federal bankruptcy exemption under 11 USC §522(b)(2)(A). While the Fourth Circuit in this case did not feel the need to reach this question, see p. 16a, infra, the Fifth, Eighth, Ninth and Eleventh Circuits all addressed this issue in their opinions, to which other courts disagree and hold to the contrary. See Komet, supra.

The Fifth, Eighth, Ninth and Eleventh

Circuits concluded ERISA was not a "federal exemption" under 11 USC §522(b)(2)(A), but that such exemptions were limited to federal government program benefits which by specific statutory directive were exempt from any seizure. See Daniel 771 F.2d at 1361. This determination was based in part on the statutory interlock of the varying exemption schemes in 11 USC §522 as well as the legislative history of 11 USC §522 which did not include ERISA in a long listing of specific federal exemption statutes. See S. Rep. No. 989, 95th Cong. 2d Sess. 75 reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5861.

11 USC §522 permits each state to choose whether debtors are limited to only those exemptions in bankruptcy permitted by that state (commonly termed "opt out") or, may use the Bankruptcy Code exemptions set out in 11 USC §522(d). Under 11 USC

§522(d)(10)(E), a debtor in a state permitting the Bankruptcy Code exemptions is entitled to exempt from the bankruptcy estate his ERISA qualified plan benefits, but only "to the extent reasonably necessary for the support of the debtor..."

Virginia, the applicable state for Shumate, "opted out" of the Bankruptcy Code exemption scheme and thus limits debtors to Virginia exemptions in bankruptcy under 11 USC §522(b)(2) and whatever comprises federal exemptions other than those exemptions appearing in 11 USC §522(d). The Daniel, Goff, Lichstrahl and Graham Courts found the specific exemption for pension benefits in 11 USC §522(d)(10)(E) to reflect that Congress could not have intended a comprehensive ERISA exemption for such benefits under 11 USC §522 (b)(2)(A). To do so would render the 11 USC §522(d)(10)(E) exemption superfluous as

well as incongruous. How could ERISA be deemed to create a comprehensive "federal exemption" through 29 USC §1056(d)(1) in "opt out" states like Virginia under 11 USC §522(b)(2)(A) (which would shelter all of Shumate's benefits), but yet have debtors limited to a lesser amount in other states (using the Bankruptcy Code exemptions) to "the extent reasonably necessary for the support of the debtor under 11 USC §522(d)(10)(E)?" 706 F. 2d at 585; 771 F. 2d at 1361.

As the Fifth Circuit concluded in Goff, after examining the legislative history of 11 USC §522, the "federal exemptions" intended by that statute were those with a direct statutory prohibition on alienation such as for Civil Service Retirement benefits. 706 F.2d at 583.

> The money mentioned by this subchapter is not assignable, either in law or equity ... or

> subject to execution, levy, attachment, garnishment, or other legal process. 5 USC §8346.

ERISA, by contrast in 29 USC §1056(d)(1), does not provide a direct statutory prohibition on alienation, but instead directs the plan trust to include a protective provision. The Fifth Circuit has interpreted this method not to give a debtor's retirement benefits derivative protection under ERISA.

> "If Congress had intended that ERISA would provide such an exemption, a provision similar to 5 USC §8346 would have been enacted." 706 F.2d at 574.

In this case, the District Court confirmed Virginia was an "opt out" state so the specific ERISA exemption of 11 USC §522(d)(10)(E) was unavailable to Shumate. Citing Goff, Lichstrahl, Graham and Daniel, the District Court held that the Bankruptcy Code's legislative history did not support

including ERISA as a federal exemption under 11 USC §522(b)(2). Accordingly, Shumate's CFC Plan interest was not exempt property. See p. 45a, infra.

The Supreme Court should adopt the reasoning of the Courts of Appeal which hold that ERISA does not create a "federal law" exemption under 11 USC §522(b)(2)(A), and that exemption of ERISA plan benefits in bankruptcy is determined by state law in "opt out" states and by 11 USC §522(d)(10)(E) in other states. If this Court concurs with the Petitioner to reverse the Fourth Circuit's ruling that "applicable nonbankruptcy law" includes ERISA under 11 USC §541(c)(2), the current conflict between districts would be virtually unaffected unless the federal exemption question under 11 USC §522(b)(2) is also determined.

III. *Longstanding public policy prohibits a bankruptcy debtor with dominion, control and the right to terminate the retirement plan in which he has an interest, from sheltering that asset from his bankruptcy estate.*

In McLean, supra, the Fourth Circuit appeared to endorse the proposition that regardless of whether an ERISA exclusion under 11 USC §541(c)(2) or an exemption under 11 USC §522 could be found, there was an overriding public policy found in state law which could void the antialienation protection of a debtor's retirement interest.

> The pension fund is not one of those which because settled and revocable by a beneficiary, may not on that account for public policy reasons be protected against the claims of the beneficiary's creditors by antiassignment provisions. 762 F.2d at 1204.

The District Court below relied

heavily on this public policy, citing McLean, that a trust beneficiary with control so as to revoke a trust at will and receive the assets would not be protected from his creditors. See p. 29a infra. Shumate was found to have that type of all pervasive control which Virginia spendthrift trust law would not protect. In such cases, the District Court determined, "Public policy demands that debtors not be allowed access to their funds to the detriment of creditors." See p. 36a, infra. Accord, Richardson v. TIAA/CREF, 123 B.R. 540 (E.D.N.C.1991).

Even if the Court determines ERISA is "applicable nonbankruptcy law" under 11 USC §541(c)(2) or a federal exemption in bankruptcy under 11 USC §522(b)(2), it should still reverse the Fourth Circuit's decision to preserve the fundamental public policy against self-settled trusts acting

to thwart creditors in bankruptcy. Otherwise, debtors like Shumate can set up retirement funds directly or indirectly which they can drain of assets, to the exclusion of creditors, once bankruptcy is filed. There is no requirement Shumate use any of the funds from the CFC Plan for retirement; he can do with them as he pleases. It seems unlikely Congress would have drawn ERISA to protect retirement, craft the Bankruptcy Code as all inclusive of a debtor's property, but yet allow a debtor like Shumate to control and direct a large retirement fund which he could exempt from creditors and then use upon termination as he so chooses.

CONCLUSION

The central question of whether "applicable nonbankruptcy law" in 11 USC §541(c)(2) is meant to include ERISA or is

a state spendthrift trust determination is clearly an important question of federal law which has not been, but certainly should be, settled by this Court. It is equally important to determine the related federal law question as to whether ERISA, in and of itself, creates an exemption in bankruptcy under 11 USC §522(b). Both questions represent issues which should reflect a uniform federal law for two subject matters which are exclusively federal in their operation: the Bankruptcy Code and ERISA.

The national confusion over this area of Bankruptcy Code and ERISA conflict has created diametrically opposed applications of federal law which places bankruptcy trustees, debtors, and retirement plans in all Circuits in persistent litigation over an area which should be settled by this Court. The inconsistent and unequal

application of the Bankruptcy Code and ERISA created by the conflicting decisions of the Courts of Appeal should be resolved as soon as possible. Previously, the Court denied certiorari in Daniel, 106 S.Ct. 1199, and Lucas, 111 S.Ct. 2275; two decisions involving the issues represented by this case which reach absolutely contrary results. Until the Supreme Court acts to resolve the issues raised by this case, this important area of federal law will remain a quagmire of conflict, forum shopping and uncertain liability for thousands of parties involved in bankruptcy or ERISA matters, all of whom should be able to rely on a uniform interpretation of federal law.

The Shumate case represents a clear opportunity for the Supreme Court to resolve these conflicts by granting this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Joseph B. Shumate Jr., Plaintiff-Appellant, v. John R. Patterson, Trustee, Defendant-Appellee, and ROY V. CREASY; COLEMAN FURNITURE CORPORATION, PENSION PLAN, Defendants.	No. 88-2174

Appeal from the United States
District Court
for the Western District of Virginia
at Roanoke.
Glen M. Williams, Senior District Judge.
(CA-86-272)

Argued: April 10, 1991

Decided: August 12, 1991

Before PHILLIPS and SPROUSE,
Circuit Judges,
BUTZNER, Senior Circuit Judge.

Reversed by published opinion. Judge Phillips wrote the opinion, in which Judge Sprouse and Senior Judge Butzner joined.

COUNSEL

ARGUED: Robert Arnold Lefkowitz, MALONEY, YEATTS & BARR, P.C., Richmond, Virginia; Joseph B. Shumate, Jr., Pulaski, Virginia, for Appellant. George Steven Agee, OSTERHOUDT, FERGUSON, NATT, AHERON & AGEE, P.C., Roanoke, Virginia, for Appellee. ON BRIEF: Kevin R. Huennekens, MALONEY, YEATTS & BARR, P.C., Richmond, Virginia, for Appellant.

OPINION

PHILLIPS, Circuit Judge:

This appeal requires us to revisit the question whether an interest in an ERISA-qualified pension plan (a trust) should be included as property of the debtor's estate, where the self-settled trust contains an ERISA-imposed non-alienation provision but otherwise would not qualify as a spendthrift trust under state law. We hold that under *In re Moore*, 907 F.2d 1476 (4th Cir. 1990), the interest here in issue is not includible in the debtor's estate

and accordingly reverse the district court's holding to the contrary.

I

Joseph Shumate was the president and chairman of the board of Coleman Furniture Co. ("Coleman") from 1978 until early 1983. During this time, he controlled 96% of the voting stock and had the power to appoint and control the board of directors. Both before and after Shumate joined the company, Coleman had an ERISA-qualified pension plan that was financed solely by employer contributions. Shumate had an interest in the pension plan valued at $250,000; nearly 400 other Coleman employees also participated in the plan, though to a far lesser extent.

In 1982, Coleman suffered financial problems, and filed for bankruptcy protection. Shortly thereafter, Shumate experienced financial difficulties himself,

and he filed for bankruptcy in June 1984. John R. Patterson, the defendant in this lawsuit, was appointed a trustee for Shumate's bankruptcy estate. After much litigation over the Coleman pension plan, all of the 400 Coleman workers except Shumate were paid off in full by Coleman's bankruptcy estate. As a result, Patterson filed an adversary proceeding in bankruptcy court against Coleman's trustee to recover Shumate's interest in the pension plan so it would be included in Shumate's bankruptcy estate. Shumate responded by asking the district court, engaged in a related proceeding, to compel Coleman's trustee to pay directly to him his interest in the plan. The district court assumed jurisdiction over the bankruptcy court action and granted Patterson leave to intervene.

The court then held that Shumate's

interest in the plan should be included in the estate, pursuant to 11 U.S.C. §541(a), on the basis that Shumate's control over the pension plan was so complete as not to qualify the pension plan, under applicable Virginia law, for spendthrift trust status. The court further held that assuming Shumate's interest in the pension was deemed property of the estate, it was not exempted by virtue of §522(b)(2)(A), because Shumate's interest in the ERISA-qualified pension plan was not "exempt under federal law."

This appeal by Shumate followed.

II

Section 541 of the Bankruptcy Code provides that "all legal or equitable interests of the debtor in property as of the commencement of the case" become part of the bankruptcy estate. Though this provision was intended to be broad in

scope, *see United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05 (1983); H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-38, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6323-24, the Code allows certain exceptions. 11 U.S.C. §541(a)(1). One of the exceptions stipulates that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under *applicable nonbankruptcy law* is enforceable in a case under [the Bankruptcy Code]." *Id.* §541(c)(2) (emphasis added).

After the district court's decision in the instant case, this court held in *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), that "applicable nonbankruptcy law" includes the Employment

Retirement Insurance Security Act (ERISA).[1] In that case we looked to the plain language of the statute and found "applicable nonbankruptcy law" to be not limited to state law but also to embrace federal statutes, including ERISA. 907 F.2d at 1477-79 ("'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the

[1]Other courts have interpreted "applicable nonbankruptcy law" to refer only to state spendthrift trust laws. *See, e.g., In re Goff*, 706 F.2d 574 (5th Cir. 1983); *see also In re Daniel*, 771 F.2d 1352 (9th Cir. 1985) (following *Goff*); *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985) (same); *In re Graham*, 726 F.2d 574 (5th Cir. 1983) (same). On that basis, those courts have declined to consider ERISA an "applicable nonbankruptcy law" so as to exclude pension plan interests from a bankruptcy estate. For the reasons set forth in *In re Moore*, 907 F.2d 1476, we disagree. *Accord In re Lucas*, 924 F.2d 597 (6th Cir. 1991) (following *Moore*); *In re Kincaid*, 917 F.2d 1162, 1169-70 (9th Cir. 1990) (Fletcher, J., concurring) (concluding that *Daniel* was wrongly decided and urging that *Moore* be followed).

phrase 'applicable nonbankruptcy law'... suggests that the phrase refers exclusively to state law much less to state spendthrift trust law."). We further held that because ERISA enforces restrictions on the transfer of pension interests under its non-alienation requirement,[2] it constitutes an

[2]In order to gain tax-exempt status, every plan must contain a non-alienation provision. *See* 26 U.S.C. §401(a)(13) ("benefits provided under the [qualified trust] plan may not be assigned or alienated"); *see also* Treas. Reg. §1.403(a)-13(b)(1)("[A] trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process."). Appellees suggest, relying on the Fifth Circuit opinion in *Goff*, that because this requirement is imposed through the tax laws and is not an affirmative law, the requirement has less force. Aside from the unassailable point that many things are accomplished through tax laws that, for one reason or another, are not done through affirmative laws, this suggestion also ignores case law, which has enforced the non-alienation provision in a number of ERISA plans. *See, e.g., Tenneco Inc. v.*

"applicable nonbankruptcy law." *See id.* at 1479-81.

Under the *Moore* analysis, therefore, the ERISA non-alienation requirement qualifies as "[a] restriction on the transfer of a beneficial interest of the debtor in a trust enforceable under applicable nonbankruptcy law." Appellees concede as much, but seek to escape the force of *Moore* by contending that *Moore* does not stand for an ironclad proposition that ERISA creates an automatic exclusion in bankruptcy, but that such an exclusion must turn on "state law governing spendthrift trust or public policy." We disagree.

First Virginia Bank, 698 F.2d 688 (4th Circ. 1983) (a debtor's interest in a qualified ERISA plan held exempt from a third party creditor's garnishment, based on the non-alienation provision). However imposed, the non-alienation provision has teeth.

The nub of appellees' argument is that the non-alienation requirement in Coleman's ERISA-qualified pension plan did not effectively apply to Shumate because he controlled the company and thereby could control the pension plan.[3] The evidence is that Shumate held 96% of the stock of the company, that he could vote in or out all the board of directors, that the board could terminate the pension plan at any time, and that he would personally benefit from any reversion from the plan upon termination. From this the district court concluded that a trust in which a beneficiary wields such power cannot be held a valid spendthrift trust, since public policy dictates that when debtor is both settlor and beneficiary of the trust

[3]Shumate's level of *potential* control is great and not seriously disputed, though Shumate contends that his legal and actual control is small.

it will not be enforced.

This focus on state spendthrift trust law, which looks to the reality behind the non-alienation provision, is misplaced. ERISA requires a plan to have a non-alienation provision, and that provision has been vigorously enforced. *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S. Ct. 680 (1990); *Smith v. Mirman*, 749 F.2d 181, 183 (4th Cir. 1984); *General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980). No more inquiry need be made to determine whether the trust is controlled by the settlor or the beneficiary or whether they are the same person. As we held in *Moore*, "ERISA's non-alienability provisions prevent both voluntary and involuntary encroachments on vested benefits. Thus, neither plan participants nor general creditors may reach benefits under an ERISA-qualified

profitsharing and pension fund." 907 F.2d at 1480 (citations omitted). Looking only to the terms of the plan before us, we are satisfied that this conclusion also applies to the Coleman pension plan.

Hence, this court's holding in *Moore* precludes the fact-based state law inquiry urged by appellees. We think it is not giving *Moore* undue weight to say that it stands for the proposition that all ERISA-qualified plans, which by definition have a non-alienation- provision, constitute "applicable nonbankruptcy law" and contain enforceable restrictions on the transfer of pension interests. *Id.* That conclusion rests not on the reality of the particular beneficiary-settlor-trust relationship in issue, but instead on the status of the plan as ERISA qualified. Consequently, Shumate's interest in the pension plan should be excluded from the bankruptcy

estate under §541(c)(2).[4]

This holding is consistent with the clear intent of ERISA and the Bankruptcy Code. Congress passed ERISA to guarantee that "if a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit-he actually will receive it." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S.359,375 (1980). To make sure this guarantee was not eroded, Congress imposed restrictions on the assignment and

[4]Creditors concerned that a non-alienation provision is ineffective because of a debtor's control over a pension plan, either before or after bankruptcy, are not without other means of protection. Under 11 U.S.C. § 548, a bankruptcy estate trustee can void a debtor's transfer of property that was made in the prior twelve months and was made with the intent to hinder, delay, or defraud creditors. In this way, creditors can block a debtor in Shumate's position from actually taking advantage of his control position and depleting the estate.

alienation of pension benefits. *See* 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 401(a)(13). These restrictions demonstrate a "strong public policy against the alienability of an ERISA plan participant's benefits." *Smith v. Mirman*, 749 F.2d at 183. The strength of this public policy judgment was reaffirmed recently by the Supreme Court in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S. Ct.680 (1990). In *Guidry*, the Court held that the pension fund could not attach Guidry's pension benefits to recover the money Guidry had embezzled from the fund. The Court held that ERISA's nonalienation requirement "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents...), even if that decision prevents others from securing relief for the wrongs done them." 110 S. Ct. at 687.

The Bankruptcy Code reflects a different, but not incompatible, congressional intent. In enacting the Code, Congress sought to define broadly a debtor's estate, *Whiting Pools*, 462 U.S. at 204, but also recognized that certain property should be excluded from the estate. *See* 11 U.S.C. § 541 (b), (c)(2). One class of property universally recognized as not included is a debtor's interest in a spendthrift trust. *See, e.g.*, *McLean v. Central States, Southeast & Southwest Areas Pension Fund*, 762 F.2d 1204 (4th Cir. 1985); *Goff*, 706 F.2d 574. Courts have so held because § 541 mandates that where trusts contain enforceable restrictions on transfer of a beneficial interest, those restrictions must be recognized in bankruptcy and there operate to exclude the interest from the debtor's estate. As this court made clear in *Moore*,

we see no reason to restrict § 541(c)(2)'s exclusion provision to spendthrift trusts. Instead, following the rule that, whenever possible, statutes should be read in harmony and not in conflict, *Morton v. Mancari*, 417 U.S. 535, 551 (1974), we interpret these in such a way as to give full effect to both ERISA and the Bankruptcy Code by holding that interests in ERISA-qualified pension plans are excluded from a bankrupt's estate. *See Moore*, 907 F.2d at 1479-80.

III

Because we hold that debtor's interest in the pension plan is excluded from the estate, we need not reach the question whether debtor's interest would in any event qualify for exemption under § 522(b). *See* 11 U.S.C. § 522(b) ("an individual debtor may exempt from property of the estate... any property that is exempt under

Federal law").[5] Accordingly, the judgment of the district court is reversed.

REVERSED

[5]For a persuasive opinion that such an interest should, under § 522, be subject to exemption because ERISA is "federal law," *see In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989).

Roy V. CREASY, Trustee in Bankruptcy for Coleman Furniture Company, Plaintiff,

v.

COLEMAN FURNITURE CORPORATION, Defendant.

Civ. A. No. 86-0272-R.

United States District Court, W.D. Virginia, Roanoke Division.

March 1, 1988.

Chapter 7 debtor sought turnover of his interest in his bankrupt firm's pension plan. The District Court, Glen M. Williams, J., found that: (1) debtor who exercised complete control over his firm's pension plan could not exclude his interest in claim from his Chapter 7 bankruptcy estate, and (2) debtor could not exempt his interest in plan.

Ordered accordingly.

1. Bankruptcy 2548

Debtor's interest in his firm's pension plan was includable in his bankruptcy estate, though plan purported to be spendthrift trust, in that debtor exercised complete control over firm, and thus had authority to terminate plan at will and pay proceeds to himself; fact that debtor signed loan agreement which prohibited removal of collateral from firm did not change legal control debtor exercised over pension plan. Bankr.Code, 11 U.S.C.A. § 541(c)(2).

2. Bankruptcy 2779

Chapter 7 debtor's interest in pension plan was not exempt, though plan contained clause prohibiting assignment to creditors. Bankr.Code, 11 U.S.C.A. § 522(b)(2)(A).

Roy V. Creasy, Roanoke, Va., Trustee for plaintiff.

Harry S. Rhodes, Roanoke, Va., for plaintiff.

James F. Douthat, Roanoke, Va., George V. Hanna, III, Charlotte, N.C., Joseph B. Shumate, Jr., Pulaski, Va., William M. Mercer-Meidinger, Inc., Richmond, Va., for defendant.

MEMORANDUM OPINION

GLEN M. WILLIAMS, District Judge.

The principal question presented in this case is whether a debtor who exercised complete control over his firm's pension plan may exclude his interest in the Plan from his Chapter 7 bankruptcy estate under the "non-bankruptcy law" exclusion of 11 U.S.C. § 541(c)(2) or the "federal law" exemption of § 522(b)(2)(A). The court rules that he cannot and denies the debtor's motion to compel the firm's Chapter 7 trustee to pay him his pension interest.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

These proceedings revolve around the Coleman Furniture Corporation (CFC), a Virginia corporation, and its president and majority stockholder, Joseph B. Shumate, Jr. (Shumate), a Virginia resident, both of whom are undergoing liquidation pursuant to Chapter 7 of the bankruptcy code. *See also Creasy v. Coleman Furniture Corp.*, 763 F.2d 656 (4th Cir.1985), Roy V. Creasy (Creasy), as Chapter 7 trustee for CFC, originally petitioned this court to employ actuaries to terminate the CFC plan in an adversary proceeding against CFC. Shumate, as a *pro se* intervenor, filed a motion to compel Creasy to pay him his benefits under the plan. John R. Patterson, Shumate's Chapter 7 trustee, was permitted to intervene because he also claimed ownership of Shumate's interest in the pension plan.

Although Shumate also had contested the trustee's calculation of his interest in the plan, he and the trustees have agreed to settle that portion of the dispute.[1] Therefore, the only issue before the court is whether to grant Shumate's motion to compel.

The CFC pension plan was created in 1964. Although the original fund documents have been amended and restated since that time, the parties have stipulated that the 1976 pension fund plan documents (plan)

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[1]. Shumate originally calculated his interest in the plan to be $300,000 while the plan's trustee's figure was closer to $200,000. This dispute over the amount was settled by requiring the trustee to deposit $250,000 in escrow to satisfy Shumate's pension claim. This allowed the plan to settle with all other pension participants. In return for this settlement, Shumate agreed to drop his claims against the trustee for breach of fiduciary duty. Once the right to Shumate's interest is settled and final expenses are paid, approximately $561,000 will revert to Creasy as CFC's bankruptcy trustee.

govern this case. The plan provides that CFC can terminate the pension fund at any time. Upon termination, the plan allowed a recipient to receive a lump fund payment instead of a life annuity. Shumate has had voting control of CFC from at least 1978 through his ownership of CFC stock and the right to vote other stock held in a voting trust. Therefore, Shumate could have terminated the plan at any time before the bankruptcy and received not only his pension interest, but any excess funds not needed to satisfy the rights of other participants. To date, all participants have made some payment arrangement with the pension except for Shumate. The plan prohibits the alienation of benefits or the transfer of plan assets for the benefit of creditors, as required by 29 U.S.C. § 1056(d)(1) (Employee Retirement Income Security Act (ERISA)) and 26 U.S.C. §

401(a)(13) (Internal Revenue Code).

CONCLUSIONS OF LAW

Conceptually, the task at hand is easily grasped. Once a debtor files a petition in bankruptcy under Chapter 7, an estate is created. 11 U.S.C. § 541(a) (1985). The estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* Notwithstanding these broad provisions, a debtor may exclude certain specifically enumerated assets from the liquidation process. § 522(b). This statutory framework reveals that there are two decision points crucial to Shumate's recovery of his interest in the pension plan. First, the asset must not be included in his liquidation estate. Second, if the asset is part of the estate, he must place it within one of the exclusions. Otherwise, Shumate must

deliver the asset to the trustee, § 521(4), who in turn must reduce the property to money in order to settle the claims of all creditors. § 704(1). The court begins first with the issue of whether the pension is part of Shumate's Chapter 7 estate.

Whether Shumate May Exclude His Interest From the Chapter 7 Estate through § 541(c)(2)

The bankruptcy code includes "all legal and equitable interests" in the bankrupt's estate except as specifically excluded. § 541(a). There is no doubt that a bankrupt's interest in a pension plan is a legal or equitable interest; this conclusion flows from the sweeping language and the accompanying legislative history. *See McLean v. Cent. States, S. & S. Areas Pen. Fund,* 762 F.2d 1204, 1206 (4th Cir. 1985). The analysis must therefore focus on the statutory exclusions from the

estate.

The only exclusion applicable to Shumate's interest in the CFC pension plan is found in § 541(c)(2) of the code: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." The Fourth Circuit has interpreted the phrase "nonbankruptcy law" to mean state law. *See McLean, 762 F.2d at 1207-06* (Illinois law controlled to apply § 541(c)(2)). The question then becomes whether the CFC pension trust is a valid spendthrift trust under Virginia law, which governs the plan.

Virginia recognizes spendthrift trusts. Va.Code § 55-19 (1986).[2] To be

[2]. **Estates in trust subject to debts of beneficiaries; exception for spendthrift trusts.--** Estates of every kind holden or possessed in trust shall be subject to the

valid a trust must have "a competent settlor and trustee, an ascertainable trust res and certain beneficiaries." *In re Wilson*, 3 B.R. 439, 442 (Bankr.W.D.Va.1980). The CFC pension plan seems to satisfy these requirements: Article VII of the plan provides for the creation of a trust fund in accordance with a trust agreement incorporated by reference in the plan; Article II defines the beneficiaries as eligible CFC employees, Article VII provides for the funding of the

debts and charges of the persons to whose use or to whose benefit they are holden or possessed, as they would be if those persons owned the list interest in the things holden or possessed as in the uses or trusts thereof; but any such estate, not exceeding $500,000 in actual value, may be holden or possessed in trust upon condition that the corpus thereof and income therefrom, or either of them, shall be applied by the trustee to the support and maintenance of the beneficiaries without being subject to their liabilities or to alienation by them, but no such trust shall operate to the prejudice of any existing creditor of the creator of such trust.

trust res held by the bank; the trust purpose is legal as it is a private pension plan; and Article XII contains a non-assignability provision.[3] *Cf. Parkinson v. Bradford Trust Co. of Boston (In re O'Brien)*, 50 B.R. 67 (Bankr.E.D.Va.1985) (Keogh Pension Trust valid under Virginia law but spendthrift provision unenforceable because of settlor-beneficiary relationship).

However, the significant issue in this case is whether the court should deny Shumate his interest in the trust on the authority of a long line of cases which invalidate pension trusts vis-a-vis the debtor for public policy reasons when that debtor is both the settlor and beneficiary

[3]. The court does not address the $500,000 limitation provided by § 55-19 but assumes, *arguendo*, that there is no problem since only the $250,000 remaining in the plan is at issue and all other claims have been satisfied.

of the trust. *E.g., Matter of Goff*, 706 F.2d 574 (5th Cir. 1983). The Fourth Circuit has adopted this precedent in *McLean* where it is stated: "Moreover, the [pension fund in this case] is not one of those which because settled and revocable by a beneficiary, may not on that account for public policy reasons be protected against the claims of the beneficiary's creditors by anti-assignment provisions." 762 F.2d at 1207. The court later restated its adoption of the doctrine citing *Goff*. *Id.* at 1208. Therefore, the court rejects the cases Shumate has cited which did not accept the doctrine, *e.g., In re Ralstin*, 61 B.R. 502 (Bankr.D.Kan. 1986), but reviews other cases to determine the doctrine's parameters and whether this case falls within its purview.

The Fifth Circuit in *Goff* seems to have been the first to best articulate the

policy. In *Goff* the court stated that the ERISA-qualified Keogh plan at issue could not be viewed as a spendthrift trust because the self-employed "settlors" had created what was in effect a revocable trust for their own benefit. *Id.* at 580-82. The court believed the provision applied to "traditional spendthrift trusts," *Id.* at 581, a limitation to the language specifically rejected by the Fourth Circuit. *McLean*, 762 F.2d at 1207 n. 1. Other courts have invalidated pension trusts vis-a-vis the debtor in the settlor-sole beneficiary context. *See In re Daniel*, 771 F.2d 1352 (9th Cir.1985) and *In re Graham*, 726 F.2d 1268 (8th Cir.1984) both of which involved physicians who were settlors/sole beneficiaries/trustees of their professional corporation's ERISA-qualified pension plans. This case presents different facts because Shumate

was not the settlor of the plan, he was one of approximately 400 beneficiaries, and CFC is not a small professional corporation.

The trustee argues that the doctrine extends to the facts of this case because of the control Shumate exercised over CFC. The trustee points to *In re Lichstrahl*, 750 F.2d 1488 (11th Cir.1985) which involves an M.D.-controlled professional corporation with an ERISA-qualified pension plan. The court held the spendthrift trust was not valid under Florida law because the physician, the plan's major beneficiary, could control disbursements from the plan through his power of revocation. 750 F.2d at 1490. Under Florida law, this control rendered the trust invalid as such trusts were meant to protect the beneficiary not only from his creditors, but from himself. *See Croom v. Ocala Plumbing & Electric Co.*, 62 Fla. 450, 57 So. 243 (1911); *see also*

Nixon v. P.J. Pedone & Co. (In re Nichols), 42 B.R. 772, 776 (Bankr.M.D.Fla.1984). Although *Lichstrahl's* facts involve a settlor-beneficiary relationship, the case is significant for recognizing the element of control as a bar to enforcing a spendthrift provision in the bankruptcy context. At least one court has provided a good explanation of the control test:

> The degree of control that the debtor may exercise over the trust assets is a crucial factor in determining the issue of inclusion in, or exclusion from, the bankruptcy estate. If the debtor's access to the funds is relatively unfettered, exclusion from the bankruptcy estate would create a temptation to shelter assets in a trust and withdraw them for personal use upon issuance of the bankruptcy discharge. *Matter of Goff*, 706 F.2d at 588. Limited control may be permitted if its exercise

would create such hardship for the debtor as to discourage its exercise except in dire circumstances. *See Matter of Baviello*, 12 B.R. 412, 415 (Bankr. E.D.N.Y.1979); *In re Wright*, 39 B.R. 623 (D.S.C.1983). Where the use of the funds would require that the debtor leave employment, become disabled or die it is clear that the funds retain their nature as future earnings rather than present savings. Such provisions should not invalidate an otherwise valid spendthrift trust.

In re Pettit, 61 B.R. 341, 346 (Bankr.W.D. Wash.1986).

Courts which have applied the control test have found for and against the debtor. One court invalidated spendthrift provisions when the debtor could obtain the funds he contributed to the plan by showing an immediate and severe hardship which was

nothing more than a "mere formality." *In re Monahan*, 68 B.R. 997 (Bankr.S.D.Fla.1982). The debtor was found to possess too much control when the employer could completely or partially terminate the plan at any time for beneficiary/employees who were also sole stockholders, directors and officers of the employer. *In re Gillett*, 46 B.R. 642 (Bankr.S.D.Fla.1985). However, a debtor did not have too much control over the trust when he had to quit his job to get his money. *Gennet v. ICMA Retirement Corp. (In re Forbes)*, 65 B.R. 58 (Bankr.S.D.Fla.1986).

The *Goff* line of cases has been adopted in Virginia. *See In re O'Brien* 50 B.R. 67. *O'Brien* involved a physician who established a Keogh plan with her husband as trustee and herself as the beneficiary. The court ruled that her power to revoke

the plan at will was inconsistent with Virginia spendthrift trusts law. 50 B.R. at 77. *O'Brien* was concerned with the strong public policy against allowing someone to place his own property in a spendthrift trust to the detriment of creditors. *Id.* at 74. The court found authority for this policy in *Petty v. Moores Brook Sanitarium,* 110 Va. 815, 67 S.E. 355 (1910) which arose prior to the Virginia spendthrift trust statute but was overruled only to the extent of allowing spendthrift trusts, not for the proposition that a settlor cannot be the beneficiary of his own spendthrift trust. 50 B.R. at 75-76.

This court believes the control test is applicable under Virginia law to determine how much power a beneficiary can exercise over a spendthrift trust before a court will invalidate it. Although there

are no Virginia cases on point, as a matter of trust theory, it seems inconsistent that a beneficiary can revoke at will his own spendthrift trust. After all, a spendthrift trust is designed not only to protect the beneficiary from his creditors but from himself. *See In re Wilson*, 3 B.R. 439, 444 (Bkrtcy.W.D.Va.1980). Furthermore, this doctrine is a matter of public policy. *McLean*, 762 F.2d at 1207; O'Brien, 50 B.R. at 74. The Virginia Supreme Court was very much concerned with public policy when it interpreted the spendthrift statute in *Sheridan v. Krause*, 161 Va. 873, 172 S.E. 508 (1934). Public policy demands that debtors not be allowed access to their funds to the detriment of creditors in appropriate cases. 50 B.R. at 74.

[1] The facts reveal that Shumate exercised great control over the CFC plan.

Before the bankruptcy, he had voting control of the stock and could have voted it to terminate the plan at any time. Upon termination, he, as a plan participant, had the choice of a lump sum payment. He also could have paid himself the reversion of any overfunded amount as a dividend on his stock. Therefore, Shumate's right to the trust assets went far beyond the hardship provisions ERISA allows beneficiaries to have in qualified plans. *See* 29 U.S.C. § 1056. Some courts have held that, although originally not the settlor of the ERISA qualified spendthrift trust, someone who holds such a power of revocation is deemed as a matter of law to be the settlor thereby falling within the *Goff* doctrine. *See, e.g. Hunter v. Ohio Citizens Bank (In re Hotchkiss,* 75 B.R. 115 (Bankr.N.D.Ohio 1987) (although the debtor was only the corporate secretary when the plan was

formed, his status as officer and shareholder makes him a settler of the pension trust). Shumate exercised such power over the CFC pension trust that he could control it to suit his needs. Such dominion is inconsistent with the notion of spendthrift trusts.

Shumate argues that he did not control the trust for two reasons. First, he argues he could not terminate the pension plan and pay out the proceeds because he was prohibited from doing so by the terms of a loan agreement he signed with North Carolina National Bank Financial Services (NCNB-FS). This agreement prohibited the removal of collateral from the business or the payment of a dividend over $50,000.[4]

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[4]. ARTICLE III

Security

3.04 The collateral referred to in Section 3.01(a) shall be used for the

These facts do not change the legal control Shumate exercised over the trust. The

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purpose intended by its purchase in the business of the Company. The Company agrees that such collateral will not be misused or abused, wasted or allowed to deteriorate, except in the ordinary wear and tear of its intended use.

ARTICLE VI

Negative Covenants

6.01 Until payment in full of the principal and interest of the Note and all of its obligations under the Financing and Security Agreement, the Company covenants that it will not, nor will it enter into any binding agreement to (without the prior written consent of the Lender):

* * * * * *

(h) declare or pay any dividends for any fiscal year on any class of its stock of more than Fifty Thousand Dollars ($50,000.00) in the aggregate other than dividends payable solely in shares of common stock or make any other distribution to any shareholder as such; provided, however, before any dividend payment, after tax profits must exceed debt service by Fifty Thousand Dollars ($50,000.00) for such fiscal year.

Loan Agreement of January 4, 1978 signed by J. B. Shumate.

trust instrument and any referenced documents control his powers, not the contracts signed with the bank. *See 19 Michie's Jurisprudence, Trusts and Trustees*, § 87 (1979). He could still terminate the pension plan and pay the proceeds out as a dividend. Although the consequences of these acts include acceleration of the note and liability for breach of contract, he nonetheless had legal control over the pension plan. Shumate surrendered the control for consideration, namely, the amount of the loan. Therefore, Shumate obtained benefits from rights he had as majority stockholder in control of the corporation. Even if the contract did change the legal right to control the trust, this court believes Shumate would be estopped from asserting an act of his own will as a bar to an exercise of power he lawfully possessed. *See* Restatement of

(Second) Agency § 8B (1934).

The second argument Shumate makes for why he did not have control over CFC is that his power over the corporation was wrested away from him by his and CFC's bankruptcies. This argument also fails. The control at issue is that which Shumate exercised *prior* to CFC's November 3, 1982 bankruptcy filing. Even after a Chapter 11 application, Shumate was a debtor-in-possession with all the powers of a trustee. *See* 11 U.S.C. § 1107(a). It was not until the conversion to Chapter 7 in July of 1983 that Shumate lost control of CFC to the Chapter 7 trustee. *See Id.* § 521(3). The loss of control due to the extraordinary event of liquidation does not affect his prior control of CFC from at least 1978.

Whether Shumate's Interest in the CFC Plan May be Exempted Under

§ 522(b)(2)(A)

[2] Once a court has decided an asset is part of the bankruptcy estate, the next step in the analysis is to decide whether the asset may be exempted. At first glance, § 522(d)(10)(E), which exempts pensions, would grant Shumate the relief he seeks. However, § 522(b)(1) allows the states to preclude debtors from claiming the § 522(d) exemptions. Virginia has elected to opt out of these exemptions through § 34-31. *In re Calhoun*, 47 B.R. 119 (Bankr.E.D.Va.1985); *See generally*, J. Reynolds, *How Bankruptcy Exemptions Work: Virginia as an Illustration of Why the "Opt out" Clause Was a Bad Idea,* 8 GMU L.Rev. 1 (1985).

The only remaining exclusion that might apply is found in § 522(b)(2)(A) which exempts any estate property that is

exempt under "Federal law."[5] The argument goes as follows: Since the pension plan contains an anti-assignment clause as required by ERISA's 29 U.S.C. § 1056(d)(1) and IRC's 26 U.S.C. § 401(a)(13), Shumate's interest is "exempt under federal law" from the bankruptcy estate.

Only a few courts have accepted the argument. *See, e.g., In re Hinshaw*, 23 B.R. 233 (Bankr.D.Kan.1982). The weight of

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[5]. The relevant portions read as follows:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

* * * * * * *

(2)(A) Any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and . . . .

authority is to the contrary. *Goff* 706 F.2d at 589; *Lichstrahl*, 750 F.2d at 1488; *Graham*, 726 F.2d 1268; *Daniel*, 771 F.2d at 1360-61. ERISA-qualified pension plans do not fall within § 522(b)(2)(A) for at least two reasons. First, the House and Senate reports contain a list of property that can be exempted under federal laws and ERISA is conspicuously absent. *See, e.g.* S.Rep. No. 989, 95th Cong., 2d Sess. 75, *reprinted in* 1978 U.S.Code Cong. & Ad. News 5787, 5861. Second, the exempted property relates to "pensions, wages, benefits and payments (which) are all peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government. In sharp contrast, ERISA regulates private employer pension systems." *Lichstrahl*, 750 F.2d at 1491 *quoting Graham*, 726 F.2d at 1274. This court adopts the reasoning of the circuit

courts which have ruled on the issue and rejects the *Hinshaw* analysis.

CONCLUSION

The motion to compel CFC's Chapter 7 trustee and plan administrator to pay Shumate his interest in the pension plan is DENIED. First, Shumate may not exclude his interest because the plan qualifies as a spendthrift trust. The control he exercised over the plan is inconsistent with the notion of a spendthrift trust. Furthermore, public policy would be violated if he could deny his creditors access to funds which were essentially a personal savings account. Second, Shumate may not exempt his interest because the plan is ERISA-qualified. Neither the legislative history nor the cases which have analyzed this issue indicate Congress intended to exempt private pension plans from the bankruptcy estate.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY V. CREASY, Trustee in Bankruptcy for Coleman Furniture Company	)	CIVIL ACTION No. 86-0272-R
v.	)	
COLEMAN FURNITURE CORPORATION	)	MEMORANDUM OPINION

This case is before the court on a motion to reconsider and amend filed by Joseph B. Shumate, Jr., (Shumate) intervenor, pursuant to Fed. R. Civ. P. 52(b). Shumate seeks an amendment to an order entered February 29, 1988 which denied his motion to compel Roy V. Creasy, (Creasy) trustee in Bankruptcy for Coleman Furniture Company, (CFC) to pay him his interest in the CFC pension plan. Shumate advances the following principal grounds as justification for granting the motion to compel; (1) the cases relied on by the court are not factually similar to the case

as bar; (2) the ruling jeopardizes the status of other beneficiaries; (3) the order contains "factual errors and misconceptions," and, (4) he has already elected to receive a pension. Each ground is addressed in turn.

Control Test

Shumate argues that the cases relied on by the court involve self employment retirement plans and not defined benefit non-contributory plans as is the CFC plan. The court recognized the extent of some of the factual distinctions for the leading cases at page 6 of its opinion. "This case presents different facts because Shumate was not the settlor of the plan, he was one of approximately 400 beneficiaries, and CFC is not a small professional corporation." Regardless, the facts of the individual cases were not controlling; it was the language and reasoning articulated in those

cases which persuaded the court. The control test seems to be so widely accepted that textbooks have adopted it as blackletter law. See 60A Am Jur 2d, Pensions and Retirement Funds §474 (1988) where the author states: "[a] retirement plan does not qualify as a spendthrift trust if a debtor has any means to gain access to plan funds when bankruptcy is filed and a bankruptcy estate is created."

Plan as Spendthrift Trust

Shumate argues that the court jeopardizes the retirement of all other CFC participants in its ruling. This is not true. The court ruled, arguendo, that the plan qualified under §55-19; but, it also ruled that for Shumate alone the spendthrift trust clause would not be upheld under the nonbankruptcy law exclusion of 11 U.S.C. §541(c)(2)(1984). The status of the trust vis-a-vis other

participants was not at issue.

Factual Errors and Misconceptions

Shumate argues that numerous factual errors and misconceptions pervade the opinion. He recites a lengthy chronological history of events surrounding his employment with CFC which was not before the court. The court took the facts from the briefs and the stipulations contained in the record. Nothing appears at odds with the most critical fact in the case, viz: through control over a majority of CFC stock, Shumate controlled the corporation and its affairs, including the pension plan.

Prior Election to Receive Pension

Finally, Shumate argues"

> [he] elected to take his pension as a lifetime annuity beginning on March 1, 1983 after he was terminated by Coleman pursuant to the plan. This was

> fifteen months before Shumate took bankruptcy. Shumate's Trustee, Mr. Patterson, has no standing whatsoever to revoke a decision made more than a year before a bankruptcy was filed.

Brief at ¶34, see also Id. at ¶36.

This is the first time this argument has been made to the court. Assuming, arguendo, these facts are true, they do not affect the court's decision. Elected or not, the law will not enforce Shumate's right to the pension interest.

The court has reconsidered and finds no reason in law or fact to alter its decision. Accordingly, the order dated February 29, 1988 shall stand and the clerk shall send certified copies of this opinion to counsel of record.

ENTER: This the 13th day of April, 1988.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY V. CREASY, TRUSTEE IN BANKRUPTCY FOR COLEMAN FURNITURE CORPORATION Plaintiff vs. COLEMAN FURNITURE CORPORATION Defendant	CIVIL ACTION NO. 86-0272-R FINAL ORDER

THIS DAY came the parties, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., by counsel, Roy V. Creasy as Plan Administrator of the Coleman Furniture Corporation Pension Plan and as Trustee in Bankruptcy for Coleman Furniture Corporation, by counsel, and Joseph B. Shumate, Jr., pro se, pursuant to a motion filed by John R. Patterson for an Order of Disbursement and Final Order.

Upon consideration of the Motion, the

arguments of counsel and for good cause shown, the Court finds that:

1. All matters involving Shumate's interest in the Coleman Furniture Corporation Pension Plan have been adjudicated by this Court in its orders of December 4, 1987, February 29, 1988, and April 13, 1988.

2. That Shumate and Patterson have no other interest in this matter and that those Orders are final with regard to them and with regard to any other claim regarding Shumate's interest in the Coleman Furniture Corporation Pension Plan, as regards Roy Creasy as Plan Administrator and as Trustee in bankruptcy of Coleman Furniture Corporation.

3. That Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia, covers identical questions of law and fact

as determined by the Court's Orders in this matter and that it is appropriate to withdraw the reference to said Adversary Proceeding and consolidate it with this civil action.

4. That all events have occurred which now entitle Patterson as Trustee of Shumate's bankruptcy estate to be paid the funds held in the Court's registry fund representing Shumate's interest in the Coleman Furniture Corporation Pension Plan.

Therefore, it is hereby

ORDERED

1. That the Clerk of this Court pay over from the Court's registry fund those funds with accrued interest deposited therewith pursuant to this Court's Order of December 4, 1987, and representing the proceeds of Shumate's interest in the Coleman Furniture Corporation Pension Plan in the initial principal amount of

$250,000.00 plus interest accrued thereon;

2. It is further ORDERED that the reference to Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia is hereby withdrawn pursuant to 28 USC §157 and such Adversary Proceeding consolidated into this Civil Action;

3. And it is further ORDERED that Shumate and Patterson are hereby dismissed as parties to this Civil Action.

4. And it is further ORDERED that Shumate's Motion for a New Trial be hereby dismissed with prejudice;

5. AND IT IS ALSO ORDERED that this ORDER is FINAL regarding Shumate's interest in the Coleman Furniture Corporation Pension Plan and regarding any and all claims by Shumate and/or Patterson against Creasy as Coleman Furniture Corporation Plan Administrator and Coleman Furniture

Corporation Trustee in Bankruptcy insofar as such claims would relate to Shumate's interest in the Coleman Furniture Corporation Pension Plan.

The Clerk of this Court shall send certified copies of this Order to counsel of record, the Clerk of the United States Bankruptcy Court for the Western District of Virginia, John R. Patterson, Trustee, Roy V. Creasy, Plan Administrator and Trustee, and to Joseph B. Shumate, Jr.

ENTER THIS 1 DAY OF September, 1988.

/s/ Glen M. Williams
JUDGE

SEEN AND AGREED TO:

John R. Patterson, Trustee

By /s/ G. Steven Agee
Of Counsel

Roy V. Creasy, Plan Administrator
and Trustee in Bankruptcy

By /s/ Harry S. Rhodes
OF COUNSEL

SEEN AND OBJECTED TO:

/s/ Joseph B. Shumate, Jr., pro se

p15.ag3.p

FILED: September 13, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No.88-2174

JOSEPH B. SHUMATE, JR.,

Plaintiff - Appellant,

versus

JOHN R. PATTERSON, TRUSTEE,

Defendant - Appellee,

and

ROY V. CREASY; COLEMAN FURNITURE CORPORATION, PENSION PLAN,

Defendants.

ORDER

Appellee has filed a motion to stay mandate and the appellant has filed a response in opposition to motion for stay. By order dated August 28, 1991, this Court temporarily stayed the mandate pending review of the motion and response.

The Court stays the mandate pending timely application to the United States Supreme Court for writ of certiorari. This grant of a stay of mandate is conditioned upon the requirement that the funds in question in this case shall remain on deposit with the clerk of the district court in an interest-bearing account until further order of this Court.

Entered at the direction of Judge Phillips with the concurrence of Judge Sprouse and Judge Butzner.

For the Court

/s/ John M. Greacen
CLERK

§522. Exemptions

11 USCS §522(b)(2)(A) "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and"

11 USCS §541(c)(2) "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title [11 USCS §§101 et seq.]."

26 USC §401(a)(13)(A) "Assignment and alienation

(A) In general. A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974."

29 USCS §1056(d)(1)

"(d) Assignment or alienation of plan benefits. (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

29 USCS §1144(d)

"(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited. Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b) [29 USCS §§1031, 1137(b)]) or any rule or regulation issued under any such law."

91-913

(2)

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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Counsel for Respondent

29pp.

Questions Presented

1. Whether a debtor's interest in an ERISA qualified pension plan is excluded from property of the debtor's bankruptcy estate under 11 U.S.C. §541(c)(2).

2. If a debtor's interest in an ERISA qualified pension plan is not excluded from property of the debtor's bankruptcy estate, whether the debtor's interest in the pension plan is exempt from the debtor's bankruptcy estate under 11 U.S.C. §522(b)(2)(A).

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Additional Statutes Involved

1. 11 U.S.C. §548, reprinted in the appendix at p. A-1.

Statement of the Case

The issue presented in this appeal concerns the ownership of the interest of Mr. Joseph B. Shumate, Jr. ("Shumate" or "Respondent") in the Coleman Furniture Corporation Pension Plan (the "Plan").

In 1963, Coleman Furniture Corporation ("Coleman") established the Plan for the benefit of its employees. Jt. App. Vol. I. p. 11, lines 18-25. The Plan was solely funded by contributions from Coleman. Jt. App. Vol II p. 284. The Plan was amended from time to time as the tax laws changed so that the Plan would conform to the tax laws and provide retirement protection to all its beneficiaries. Jt. App. Vol. II pp. 204-382.

Coleman experienced financial difficulties, and on November 3, 1982, Coleman filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. In July 1983, Coleman's case was converted to a case under chapter 7 of the Bankruptcy Code. Roy V. Creasy ("Creasy"), was appointed trustee of Coleman's bankruptcy estate. See Creasy v. Coleman Furniture Corp., 763 F.2d 656, 656-67 (4th Cir. 1985). Shumate also experienced financial difficulties and in June, 1984, he filed a bankruptcy petition under chapter 11 of the Bankruptcy Code. Shumate's case was converted to a case

under chapter 7 of the Bankruptcy Code on August 24, 1984. John R. Patterson ("Patterson" or "Petitioner") was appointed chapter 7 trustee for Shumate's bankruptcy estate.

After the filing of Coleman's bankruptcy and Shumate's bankruptcy, the administration and status of the Plan became the subject of lengthy and protracted litigation. In connection with that litigation, Shumate, Creasy and Patterson agreed to establish the value of Shumate's interest in the Plan at $250,000 (the "settlement"). The settlement was approved by the district court by order dated December 3, 1987. Jt. App. Vol. I pp. 90-96.

On April 24, 1987, Patterson filed an adversary proceeding in the Bankruptcy Court (the "Turnover Action"), to recover Shumate's interest in the Plan on behalf of Shumate's bankruptcy estate. On July 27, 1987, Shumate filed a motion in connection with a pre-existing proceeding that was pending in the district court to compel Creasy to pay over Shumate's interest in the Plan to Shumate. Jt. App. Vol. I pp. 14-16. Patterson intervened in the district court action since he claimed an interest in the Plan benefits. Jt. App. Vol. I pp. 60-61. Patterson's Turnover Action was subsequently consolidated with the action pending in the district court.

On December 16, 1987, the district court conducted a hearing to determine the entitlement to Shumate's interest in the Plan. On February 29, 1988, the lower court issued a memorandum opinion and order that denied Shumate's motion to compel. Jt. App. Vol. I pp. 140-155. On March 8, 1988, Shumate filed a motion to

reconsider and amend order. Jt. App. Vol. I pp. 156-176. The district court granted Shumate's motion but on reconsideration, the court, found no basis to alter its February 29, 1988, order. The court affirmed its ruling and granted Shumate the right to take an interlocutory appeal. Jt. App. Vol. I pp. 178-82. The Court of Appeals denied the petition to appeal.

On June 29, 1988, Shumate filed a motion for a new trial, and on August 15, 1988, Patterson filed a motion for disbursement and final order. Jt. App. Vol. I pp. 183-184 and pp. 191-195. A hearing was conducted by the district court on September 1, 1988; and on September 2, 1988, the district court granted Patterson's motion and issued a final order directing the payment of Shumate's interest in the Plan pursuant to the court's earlier ruling. Shumate appealed the September 2, 1988, order. Jt. App. Vol. I pp. 196-199.

The Court of Appeals for the Fourth Circuit initially reviewed the case on informal briefs and decided to have the case formally briefed and argued. The court assigned counsel to Shumate and heard the case. By decision dated August 12, 1991, the Fourth Circuit reversed the ruling of the district court and held that Shumate's interest in the Plan was not property of his bankruptcy estate. Shumate v. Patterson, 943 F.2d 362 (4th Cir. 1991).

During these proceedings, the parties have made a number of stipulations. First, the Plan as amended in 1976 is the plan

that governs this action.[1] Jt. App. Vol. I pp. 18 and 69. Second, the Plan contains a non-alienation provision as required under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"). Jt. App. Vol. II p. 284. Finally, the filing and conversion dates of Coleman's and Shumate's bankruptcy cases were stipulated by the parties. Jt. App. Vol. I pp. 18, 21 and 69.

Shumate had worked for Coleman for more than 20 years. He had participated in the Plan as an employee from its inception. He worked his way up through the company until he became president of Coleman in 1979. He served in that capacity until Coleman filed its bankruptcy petition. Jt. App. Vol. I p. 109, lines 9-13. Shumate also served as administrator of the Plan during his tenure as president. Jt. App. Vol. I pp. 109-110, lines 25-25 and 1.

Shumate had voting control of a majority of Coleman's stock from 1978 to the present. Jt. App. Vol. I p. 101, lines 2-25. Shumate did not have unbridled control of Coleman's assets as evidenced by a loan agreement between Coleman and North Carolina Bank Financial Service ("NCNB-FS") which loan agreement placed restrictions on the use of Coleman's assets. Jt. App. Vol. II pp. 422-445.

[1] A copy of the Plan was submitted into evidence at the December 16, 1987, hearing in the District Court before Judge Williams.

Summary of Argument

Shumate's interest in the Plan is not property of Shumate's bankruptcy estate. Under 11 U.S.C. §541(c)(2), a restriction on the transfer of a debtor's beneficial interest in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a bankruptcy case. The court of appeals properly ruled that the phrase "applicable nonbankruptcy law" refers to ERISA as well as other federal laws and rejected the petitioner's argument that this phrase referred only to state spendthrift law.

Federal policy as enunciated by Congress and this Court supports this ruling. An overriding purpose of ERISA is to protect an employee's retirement funds for the employee's use. This policy has been stated and restated in cases such as Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990); Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) and Smith v. Mirman, 749 F.2d 181, 184 (4th Cir. 1984). These cases have enunciated a strong federal policy to enforce the non-alienation provision that ERISA requires be placed in all ERISA qualified pension plans.

Additionally, there is no need to graft the public policy against self-settled spendthrift trusts contained in various of the state spendthrift trust laws on to federal law in order to protect creditors. The United State Bankruptcy Code contains adequate public policy safeguards such as Section 548, the fraudulent conveyance section, to protect creditors from mischievous debtors. Under this Bankruptcy Code provision a

trustee in bankruptcy can recover for a bankruptcy estate any property that was transferred with the intent to hinder, delay or defraud creditors or that was transferred without the payment of adequate consideration.

The Petitioner argues that a reason to grant a *writ of certiorari* is the need to have uniformity in the districts regarding the federal law governing pension plans. However, if the Petitioner's argument is accepted, the spendthrift trust law of each individual state would be applied in any circuit. Clearly greater inconsistency would result from district to district as the vagaries of each state's public policy as evidenced in its individual spendthrift trust law was applied to federal law.

Because of the decision it rendered, the court of appeals did not need to decide whether 11 U.S.C. §522(b)(2)(A) created a federal exemption for ERISA qualified pension plans. The Petitioner nevertheless invites this Court to decide this issue. The Petitioner supports his interpretation of 11 U.S.C. §522 on the decisions from various courts of appeal that find that ERISA is not an exemption under "Federal law" as that term is used in 11 U.S.C. §522(b)(2)(A).

The decisions upon which the Petitioner relies place undue emphasis on the inconclusive legislative history of the Bankruptcy Code. These decisions ignore other federal court decisions, decided outside of the bankruptcy context, that recognize the existence of a federal exemption for ERISA quali-

fied pension plan benefits. These decisions also misinterpret the reason for the existence of the non-alienation provision in ERISA plans.

The decision reached by the Court of Appeals for the Fourth Circuit is correct. The decision is supported by ample authority from this Court, and the decision conforms with the federal policy that ERISA qualified pension benefits should be protected and made available to their beneficial owners. Accordingly, this Court should deny the petition for *writ of certiorari*.

Argument

I. The Court of Appeals Properly Ruled That a Debtor's Interest in an ERISA Qualified Pension Plan is Excluded from a Debtor's Bankruptcy Estate.

The court of appeals ruled that Shumate's interest in the Plan was excluded from his bankruptcy estate under 11 U.S.C. §541(c)(2).[2] This section of the Bankruptcy Code excludes certain of a debtor's property interests from the definition of property of the debtor's bankruptcy estate. This section states:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title [11 U.S.C. §101 et seq.].

[2] Further reference to Title 11, United States Code, will be designated as Bankruptcy Code Section.

11 U.S.C.S. §541(c)(2) (Law. Co-op. 1986) (emphasis added). The court of appeals ruled that the "applicable nonbankruptcy law" to which this statute refers includes ERISA as well as all other federal laws.

In contrast, the Petitioner argues that "applicable non-bankruptcy law" refers only to state spendthrift trust law. In reaching this position, the Petitioner relies upon the authority of a long line of cases which invalidate pension trusts vis-a-vis the debtor for public policy reasons when that debtor is both settlor and beneficiary of the trust. See Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983). This public policy prevents a person from establishing a spendthrift trust to shield his own assets from his creditors. See Restatement (Second) of Trusts §156 (1959).

A. The Term "Applicable Nonbankruptcy Law" in 11 U.S.C. §541(c)(2) Is Not Limited to State Spendthrift Trust Law.

In Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990), the court of appeals held (1) that the term "applicable nonbankruptcy law" refers to all laws, state and federal, under which a transfer restriction is enforceable" and (2) that the required non-alienation provision of a qualified ERISA pension plan qualifies it for exclusion from a debtor's bankruptcy estate under 11 U.S.C. §541(c)(2). See also, John Handcock Mutual Life Ins. Co. v. Watson (In re Kincaid), 917 F.2d 1162 (9th Cir. 1990)

(Concurring opinion states that the narrow reading of the phrase "applicable bankruptcy law" in Daniel is incorrect); Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir. 1991), cert. denied, 111 S.Ct. 2275 (1991); and In re Ralstin, 61 B.R. 502 (Bankr. D. Kan. 1986).

The ruling in Anderson draws the Petitioner's analysis into question. The premises for the Petitioner's argument is that the term "applicable nonbankruptcy law" refers only to state law. He applies the public policy against self-settled spendthrift trusts to bring a qualified ERISA plan into a debtor's estate. Such an analysis improperly interjects state law onto federal ERISA law and ignores the rationale behind the creation of ERISA.

ERISA's overriding purpose is to guarantee the security of an employees' retirement income. Anderson, 907 F.2d at 1479-80; see also 29 U.S.C.S. §1001 (Law. Co-op. 1990). The security of employee retirement benefits should not be dependent on the "particularities of state spendthrift trust law." Anderson, 907 F.2d at 1480. There exists a strong federal policy to protect the sanctity and purpose of ERISA qualified employee benefit plans. Id.; see Smith v. Mirman, 749 F.2d at 184 (in declaring invalid an assignment of an ERISA qualified pension plan prior to a bankruptcy filing, the Court observed, "[w]e see a danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers.").

Other case law also evidences a strong federal policy to enforce the non-alienation provision required in ERISA qualified employee benefit plans. For example in Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983) a bank sought to garnish a debtor's accrued interest in an ERISA qualified thrift and stock ownership plan. On appeal, the Court of Appeals for the Fourth Circuit ruled that the debtor's interest in the plan was exempt from a third party creditor's garnishment. That court reasoned, "[t]he funds here had been accumulated under a general plan for retirement, and the statutory scheme clearly contemplates that they should remain available for that purpose, even though the employee might obtain employment with another employer having a qualified plan, or quit, or otherwise become entitled to a lump sum distribution." Tenneco, Inc., 698 F.2d at 690.

In McLean v. Central States, Southeast and Southwest Areas Pension Fund, 762 F.2d 1204 (4th Cir. 1985), a debtor sought to fund his chapter 13 plan by direct payments from his retirement plan to the trustee. The court held that the retirement plan benefits were not property of the estate and, accordingly, could not be made subject to a direct payment order. Although that ruling was based on a decision that the pension fund qualified as a spendthrift trust under Illinois law, the ruling illustrates a federal policy to enforce the non-alienation provision of an ERISA qualified plan.

Grafting the state law provisions governing spendthrift trust public policy onto ERISA qualified plans that are regulated by federal law contravenes ERISA's policies. Such grafting would effectively rewrite the federal statute. The preemption provision of ERISA protects qualified plans from having to comply with vagaries of state spendthrift law before they are exempt from creditor attack. See 29 U.S.C.S. §1144(a) (Law. Co-op. 1990).

The Petitioner argues that a reason to grant a *writ of certiorari* is the need to have consistency among the districts regarding the federal law dealing with pension plans; however, the thrust of the Petitioner's argument would cause inconsistency in federal law. In effect, the Petitioner argues that courts should apply each individual state's spendthrift trust law in interpreting ERISA's anti-alienation provisions in a bankruptcy case. This result would cause greater inconsistency among the districts and is inconsistent with federal policy to enforce the non-alienation provision of ERISA.

Federal courts have recognized that state law may be used to create federal common law only if the state law is not inconsistent with federal law. See Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986). The adoption of the "public policy" exception applicable to spendthrift trusts utilized by the court in Goff is inconsistent with ERISA's policy of protecting pension benefits for plan participants and their dependents. Accordingly, the Goff reliance on the public policy excepting

spendthrift trusts should not be applied to limit a beneficiary's interest in an ERISA qualified pension plan as occurred in Daniel v. Security Pacific Nat'l Bank (In re Daniel), 771 F.2d 1352, cert. denied, 475 U.S. 1016 (9th Cir. 1985), Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985), Samore v. Graham (In re Graham), 726 F.2d 1268, 1269 (8th Cir. 1984), and Goff, 706 F.2d 574 (5th Cir. 1983).[3]

Even if one accepts the application of the public policy exception applicable to state spendthrift trusts, the control that Shumate exercised over Coleman does not warrant the application of the policy. It has been established that "limited control [over a pension plan] may be permitted if its exercise would create such a hardship for the debtor as to discourage its exercise except in dire circumstances." In re Pettit, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986). Although Shumate did not exercise direct control over the Plan as a beneficiary, the Petitioner argues that the control that Shumate exercised as an officer and director was sufficient to control disposition of the Plan. Additionally, the Petitioner argues that the control that

[3] Allowing the trustee to obtain the pension benefits could destroy the entire Plan's tax qualification rendering the Plan and its benefits taxable to other beneficiaries. Private Letter Ruling No. 8910035, CCH Letter Ruling Reports (1988). Although Private Letter Rulings cannot be cited as precedent, this letter ruling demonstrates the very real possibility for the destruction of plan benefits for other plan participants, and it further illustrates why ERISA's public policy to protect plan benefits should override any competing policy or concern.

Shumate could potentially exercise over the Plan warrants the inclusion of the Plan interest in Shumate's bankruptcy estate.

This argument ignores the true character of Shumate's control. Although Shumate might have had the legal ability to terminate the Plan and take any remainder left in the Plan, he did not because loan documents between Coleman and NCNB-FS limited Mr. Shumate's ability to take such action. The court of appeals correctly dismissed this argument. The control that Mr. Shumate possibly could have exercised is similar to the hardship control that courts have allowed beneficiaries to exercise without destroying the non-alienation aspect of pension benefits. See Gennet v. ICMA Retirement Corp. (In re Forbes), 65 B.R. 58 (Bankr. S.D. Fla. 1986)(ability to obtain benefits if beneficiary terminates employee is not sufficient control to defeat "spendthrift nature" of pension).

B. Current Bankruptcy Law Adequately Protects a Trustee from Debtors Who Exert Control over a Pension Plan.

The public policy enunciated in Goff that the person in control is deemed the settlor of the trust because of potential mischief that could result from the control over property is adequately protected by Bankruptcy Code Section 548. This section allows a trustee to avoid a debtor's transfer of property that was made within one year of the filing of the bankruptcy petition and that was made with the intent to hinder, delay or

defraud creditors. Thus, if a debtor exerts control over a corporation as opposed to having the mere potential to do so that is prejudicial to the interests of creditors, then Bankruptcy Code Section 548 empowers the trustee in bankruptcy to avoid any transaction resulting in a depletion of the bankruptcy estate that stems from the control. The trustee can then recapture the property for the benefit of creditors. The fraudulent conveyance provision set forth in the Bankruptcy Code sufficiently addresses the public policy concerns enunciated in Goff.

In this case there has been no suggestion that Shumate exercised control over the corporation to transfer assets to the Plan in order to defraud, hinder, or delay creditors. Patterson did not attempt to avoid Shumate's interest in the Plan under Bankruptcy Code Section 548. Rather it was the unexercised potential of control upon which the Petitioner focused. There is no need in this case to apply the public policy exception applicable to spendthrift trusts upon which the court in Goff focused because there has been no harm to creditors.

II. Assuming That a Debtor's Interest in a Pension Plan is Property of the Bankruptcy Estate, the Interest in the ERISA Qualified Pension Plan is Exempted from the Bankruptcy Estate by the Operation of 11 U.S.C. §522(b)(2)(A).

The court of appeals did not decide if an ERISA qualified pension plan was exempt from a bankruptcy estate since it determined that such a pension plan was not property of the bankruptcy estate. The Petitioner seeks to have this Court determine this issue should the *writ of certiorari* be granted. Accordingly, the respondent presents the following argument in support of his position.

Bankruptcy Code Section 522(b)(2)(A) provides:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . . Such property is-
>
> . . .
>
> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately proceeding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; . . .

11 U.S.C.S. §522(b)(2)(A) (Law. Co-op. 1986) (emphasis added).

The provisions of ERISA, 29 U.S.C. §1056(d)(1), and the Internal Revenue Code, 26 U.S.C. §401(a)(13) which mandate non-assignability constitute a "federal law" exemption under Bankruptcy Code Section 522(b)(2)(A). This issue has been the subject of some debate. Compare Barr v. Hinshaw (In re Hinshaw),

23 B.R. 233 (Bankr. D. Kan. 1982) with In re Goff, 206 F.2d at 589; In re Lichstrahl, 750 F.2d at 1488; In re Graham, 726 F.2d 1268; and In re Daniel, 771 F.2d at 1360-61. Some courts reject this argument because the House and Senate reports for Bankruptcy Code Section 522 failed to list ERISA under its "laundry list" of property that could be exempted as federal law. Additionally, some courts observe that all of the federal law included in the legislative laundry list are "peculiarly federal in nature, created by federal law or related to industries traditionally protected by the federal government." Creasy v. Coleman Furniture Corp., 83 B.R. 404, 410 (W.D. Va. 1988) (citing In re Lichstrahl, 750 F.2d at 1491).

A recent opinion, In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989), questions the authority upon which courts have rejected this argument. In Komet, husband and wife chapter 11 debtors sought to exempt their interest in a pension and a profit sharing plan from their bankruptcy estate. After reviewing the cases interpreting Code Section 522(b)(2)(A), the Texas bankruptcy court concluded that the plans qualified as federal law exemptions under 11 U.S.C. §522(b)(2)(A).

In Komet, the court examined federal and state cases that have interpreted ERISA's non-alienation provision, 29 U.S.C. §1056(d), and ERISA's preemption statute, 29 U.S.C. §1144. The court noted that most of the courts that have examined this issue have concluded that these provisions override the operation of

state collection law, thereby creating a nonbankruptcy exemption for ERISA qualified plans. In re Komet, 104 B.R. at 806.

Tenneco, Inc. v. First Virginia Bank of Tidewater, 698 F.2d 688 (4th Cir. 1983), supports the conclusion reached in In re Komet. In Tenneco, the court ruled that a debtor's interest in a qualified ERISA plan was exempt from a third party creditor's garnishment. Accord Smith v. Mirman, 749 F.2d at 184 (an assignment of an ERISA qualified pension plan was invalid). Tenneco and the numerous cases cited in In re Komet illustrate the existence of a body of federal law that has developed around ERISA's mandatory non-alienation provision and that has effectively granted this provision nonbankruptcy exemption status. It is important to note that cases such as Tenneco rely upon the uniformity of non-alienation provision to protect plan benefits, and not the vagaries of state spendthrift law. In re Komet, 104 B.R. at 806-07.

The Komet court next observed that the only impediment to extending ERISA's federal exemption status to bankruptcy cases was "strong" dicta in In re Goff. The court observed that In re Goff's interpretation of the term "other federal law" in Code Section 522(b)(2)(A) was flawed because:

(1) Goff mistakenly characterizes the function of the anti-alienation language as applying to tax treatment only;

(2) Goff misinterprets the structure and purpose of the Bankruptcy Code and finds "a 'congressional policy' antithetical to the retention of retirement benefits where precisely the opposite policy is indicated;"

(3) Goff misinterprets the legislative history of Bankruptcy Code Section 522(b)(2)(A); and

(4) Goff mistakenly presumed that the Bankruptcy Code implicitly repealed ERISA's anti-alienation provision.

In re Komet, 104 B.R. at 809.

In re Goff and its progeny[4] incorrectly focus on the tax aspects of ERISA's non-alienation provision. Although the provision is required for companies to obtain favorable tax treatment for plan contributions, the provision accomplishes more than the granting of tax benefits. It acts as a carrot to employers to insure that ERISA's labor purpose, the protection of employee retirement benefits, is accomplished. See, In re Komet, 104 B.R. at 809; 29 U.S.C.S. §1001 (Law. Co-op. 1990). Accordingly, Goff incorrectly reads with myopic vision the purpose of the non-alienation provisions of ERISA.

In re Goff also fails to recognize the genesis of the Bankruptcy Code's policies of fresh start and exemption. In re Goff assumed that while the Bankruptcy Reform Act of 1978 expanded the scope of the bankruptcy estate, it also sought to symmetrically limit the debtor's possible exemptions. As the Komet court illustrates, Goff's interpretation is incorrect. In revising the concept of property of the estate, the Bankruptcy Reform Act of 1978 expanded the concept of property to enhance uniformity in bankruptcy proceedings and to broaden the new

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[4] In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985); In re Daniel, 771 F.2d 1352 (9th Cir. 1985)

bankruptcy court's jurisdiction. This expansion took the former Bankruptcy Act's procedure of determining estate property and centralized it in the new bankruptcy courts. This expansion also made exempt property part of the bankruptcy estate. However, when it expanded the definition of property of the estate, Congress had to amend Bankruptcy Code Section 541 to eliminate spendthrift trust benefits as well as interests held in trust for others from inclusion as property of the estate. By this amendment, Congress merely intended to maintain the status that these interests in property had under former law. See Komet, 104 B.R. at 810-11.

In dealing with exemptions, Congress enacted Bankruptcy Code Section 522. This section was intended to honor existing exemption law in bankruptcy. There was no intent to exclude federal exemptions that were reorganized by the former Bankruptcy Act. See In re Komet, 104 B.R. at 811-13. Accordingly, an examination of the concepts of "property of the estate" and "exemptions" illustrates that Goff's interpretation of their interplay is incorrect.

The Petitioner places significant importance on ERISA's absence from the laundry list of federal exemptions in the legislative history of Code Section 522. According to the Petitioner, this absence excepts ERISA from the "other federal exemptions" of §522(b)(2)(A). As discussed earlier, this position is inconsistent with the recognition of a nonbankruptcy exemption for ERISA enunciated in the cases above. If this Court

accepts Goff's interpretation of Code Section 522(b)(2)(A) as argued by the Petitioner, then an individual outside of bankruptcy would have greater exemption rights than someone in bankruptcy. This untenable position necessarily results if Goff is to be reconciled with Tenneco and other federal cases.

As the court noted in Komet, Congress did not intend to change prior law by enacting Code Section 522; accordingly, Code Section 522 should be read with neutrality vis-a-vis existing exemptions. Goff disregards this policy. Goff concludes that the failure to list ERISA on the legislative laundry list is dispositive of intent. The court in Komet observes that the statute is clear and does not require a strained reading of legislative intent to derive its meaning. In re Komet, 104 B.R. at 814. Goff's reading is contrary to statutory construction. Id.

Lastly, Goff found that the Bankruptcy Code implicitly repealed or altered ERISA. The Komet court suggests that this ruling was in error since Goff found a conflict without first trying to read the statutes in concert. The court in Komet observed:

> Goff first found a subsequent, generalized congressional intent to limit pension plans in bankruptcy, then concluded that intent 'trumped' the earlier congressional intent expressed in ERISA to protect those very same pension plan. For want of a better term we shall call this selective implicit amending 'repeal by implication.'

In re Komet, 104 B.R. at 815; accord McLean, 762 F.2d 1204 (4th Cir. 1985)(the court rejected a similar "repeal by implication" argument involving a conflict between [1] 29 U.S.C. §1056(d)(1); 26 U.S.C. §401(a)(13), and [2] 11 U.S.C. §§541(c)(1); 522(d)(10(E) and 1325(b)).

Komet is a well-reasoned opinion that seriously examines the weaknesses of the often cited case, In re Goff, and a growing number of courts have approved or adopted the analysis used by the Komet court. See In re Burns, 108 B.R. 308 (Bankr. W.D. Ok. 1989)(en banc opinion); In re Conroy, 110 B.R. 492, 497 (Bankr. D. Mont. 1990)(although court was obligated to follow the Ninth Circuit case, In re Daniel, the court found Komet persuasive).

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990), provides additional support for the view expressed in In re Komet. In Guidry, a union official had been convicted of embezzling union funds. After the embezzlement was uncovered, the plan's administrators refused to pay over to Guidry any benefits. The plan administrators argued that the official had forfeited his rights to benefits as a result of his criminal activity. Guidry sued to recover his benefits. Although the district court rejected the forfeiture argument, the court imposed a constructive trust on the plan benefits. Guidry, 493 U.S. at 367-70.

This Court reversed the imposition of a constructive trust on the ERISA qualified plan benefits. This Court wrote:

> Section 206(d) [29 U.S.C. §1056(d)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Guidry, 493 U.S. at 370. This strong policy pronouncement states that ERISA's non-alienation provision is a provision that creates a federal exemption under 11 U.S.C. §522(b)(2)(A). See In re Starkey, 116 B.R. 259 (Bankr. D. Colo. 1990).

Conclusion

For the reasons stated above, the respondent, Joseph B. Shumate, Jr., asks that this Court deny the Petition for a Writ of Certiorari filed by John R. Patterson, Trustee.

Respectfully Submitted,

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11 USCS § 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title [11 USCS § 544, 545, or 547], a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101(34), 741(5), or 761(15) of this title [11 USCS §§ 101(34), 741(5), 761(15)], or settlement payment, as defined in section 101(35) or 741(8) of this title [11 USCS §§ 101(35), 741(8)], takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS §§ 741(5), (15)], or settlement payment, as defined in section 741(8) of this title [11 USCS § 741(8)], in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2600; July 27, 1982, P. L. 97-222, § 5, 96 Stat. 236; July 10, 1984, P. L. 98-353, Title III, Subtitle F, § 394, Subtitle H, § 463, 98 Stat. 365, 378; Oct. 27, 1986, P.L. 99-554, Title II, Subtitle C, § 283(n), 100 Stat. 3117; June 15, 1990, P.L. 101-311, Title I, § 104, Title II, § 204, 104 Stat. 268, 269.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

Section 402(a) of Act Nov. 6, 1978, provided that this section "shall take effect on October 1, 1979.".

Amendments:

1982. Act July 27, 1982, in subsec. (d)(2)(B), substituted ", forward contract merchant, stockbroker, or securities clearing agency", for "or forward contract merchant", inserted "741(5)", inserted ", or settlement payment, as defined in section 741(8) of this title", and substituted "value to the extent of such payment." for "value.".

1984. Act July 10, 1984, in subsec. (a), in the introductory matter, substituted "if the debtor voluntarily or involuntarily" for "if the debtor", in para. (1), substituted "was made" for "occurred", in para. (2)(B)(ii), inserted "or a transaction" preceding ", or was"; in subsec. (c), inserted "or may retain" and deleted ", may retain any lien transferred, following "transferred" "; in subsec. (d), in para. (1), substituted "is so" for "becomes so far", substituted "applicable law permits such transfer to be" for "such transfer could have been", and substituted "is made" for "occurs", in para. (2), in subpara. (A), deleted "and" following "debtor;", in subpara. (B), inserted "financial institution," substituted "; and" for the concluding period, and added subpara. (C).

1986. Act Oct. 27, 1986 (effective 30 days after enactment on 10/27/86, as provided by § 302(a) on such Act, which appears as 28 USCS § 581 note), in subsec. (d)(2)(B), substituted ", financial institution" for "financial institution,".

1990. Act June 25, 1990, in subsec. (d)(2), in subpara. (B), deleted "and" following the concluding semicolon and inserted "101(34)," and "101(35) or", in subpara. (C), substituted "; and" for a concluding period, and added subpara. (D).

Other provisions:

Effective date of amendments made by Act July 10, 1984. Act July 10, 1984, P. L. 98-353, Title III, Subtitle K, § 553(a), 98 Stat. 392, which appears as 11 USCS § 101 note, provided that the amendments made to this section by such Act "become effective to cases filed 90 days after the date of enactment" on July 10, 1984.

Legislative History

This section is derived in large part from section 67d of the Bankruptcy Act. It permits the trustee to avoid transfers by the debtor in fraud of his creditors. Its history dates from the statute of 13 Eliz. c. 5 (1570).

The trustee may avoid fraudulent transfers or obligations if made with actual intent to hinder, delay, or defraud a past or future creditor. Transfers made for less than a reasonably equivalent consideration are also vulnerable if the debtor was or thereby become insolvent, was engaged in business with an unreasonably small capital, or intended to incur debts that would be beyond his ability to repay.

The trustee of a partnership debtor may avoid any transfer of partnership property to a partner in the debtor if the debtor was or thereby became insolvent.

If a transferee's only liability to the trustee is under this section, and if he takes

(5)

No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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v.

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PETITIONER'S REPLY BRIEF

The Petitioner, John R. Patterson, Trustee, files this Reply Brief pursuant to Rule 15.6 of the Supreme Court Rules to address issues first raised in the Respondent's Brief in Opposition. These matters include:

(1) That adopting the Petitioner's view of 11 USC §541(a)(2) and 11 USC §522(b)(2) would cause onerous federal income tax consequences.

(2) That Shumate did not have unbridled control of the CFC Plan or CFC's assets.

(3) That the authority granted a bankruptcy trustee under 11 USC §548 to void fraudulent transfers vitiates the need to consider the questions raised concerning Sections 541(a)(2) and 522(b)(2).

ARGUMENT

1. The Respondent (hereinafter Shumate) raises in a footnote (Brief in Opposition Page 12, Footnote 3) the argument that finding for the Trustee could cause dire consequences to the retirement plan and its beneficiaries. Shumate bases this supposition on an Internal Revenue Service private letter ruling (Private Letter Ruling No. 89-10035, CCH Letter Ruling Reports 1988), but acknowledges that as a matter of law such private letter rulings cannot be cited as precedent.

The argument raised by this footnote is bogus. 29 USC §1056(d)(1) and 26 USC §401(a)(13)(A) require a qualified retirement plan to contain an antialienation provision. A plan must: "provide that benefits provided under the Plan may not be assigned or alienated."

The CFC Plan, having such a provision in its trust arrangement, has fulfilled all obligation imposed by either the Internal Revenue Code or Title 29 in that regard. That the Congress, through a provision in the Bankruptcy Code, has voided part of what the Plan provides in the antialienation provision gives rise to no inference that the Plan has failed to fulfill the statutory requirements for tax preferred status.

2. Shumate also contends that (Brief in Opposition Page 4) he did not have unbridled control of CFC's assets or the

CFC Plan, by virtue of a loan agreement between CFC and NCNB. This assertion is directly contrary to the findings of fact made by the District Court.

The loan agreement between NCNB and CFC had no relation whatsoever to the CFC Plan or Shumate's ability to terminate the Plan and receive his Plan benefits and the value of the CFC Plan reversion. Shumate would not have violated any contract to terminate the CFC Plan. The District Court considered Shumate's argument and rejected it outright.

> "The trust instrument and any reference documents control his powers, not the contract signed with the bank." See 19 Michie's Jurisprudence, Trust and Trustee's, §87 (1979). He could still terminate the Pension Plan and pay the proceeds out as a dividend. Although the consequences of these acts include acceleration of the note and liability for breach of contract, he nonetheless had legal control over the Pension Plan. Shumate surrendered the control for consideration, namely, the amount of the loan. Therefore, Shumate obtained benefits from rights he had as majority stockholder in control of the corporation. Even if the contract did change the legal right to control the trust, this Court believes Shumate would be estopped from asserting an act of his own will as a bar to an exercise of power he lawfully possessed. Petition for Writ of Certiorari, Page 25a.

3. The Brief in Opposition also raises as a new issue that a Bankruptcy Trustee's ability to pursue fraudulent conveyances of a debtor has some ameliorative effect on this controversy. This argument has no nexus to the central issue of this case: whether a controlling debtor's plan benefits are either excluded from his estate under §541(a) or exempt under §522(b)(2). A debtor's asset is either excluded or exempt under these sections as a matter of law. If the asset is of such a nature to be excluded or

exempt, then the question of whether it was transferred by an otherwise fraudulent means is moot.

CONCLUSION

The new matters raised by Shumate offer no reason to deny the Petition for Writ of Certiorari. The assertion of lack of control is directly contrary to the findings of fact by the District Court. The dour tax consequences insinuated by footnote are not supported by any recognizable legal authority and are contrary to the clear language of the Internal Revenue Code. The fraudulent conveyance issue is without a nexus to the issues raised by this case.

What is particularly striking about the Brief in Opposition is the failure to contest the arguments set forth by the Trustee as reasons for granting the Writ. Shumate does not contest the significant

existing conflict among the Courts of Appeal over the exclusion or exemption of a bankruptcy debtor's pension benefits from his bankruptcy estate. To the contrary, he recognizes this conflict exists (Brief in Opp. pp. 16, 18).

Shumate does not contest the conflict between the Circuits has created a morass of confusion in the lower courts nationwide over the issues raised by this case. Neither does Shumate contest the Trustee's argument that a Writ should be granted because of the inconsistency of federal law in this area.

Finally, Shumate does not contest the Petitioner's argument for granting the Writ that interpreting the "applicable nonbankruptcy law" language of §541(c)(2) to create an omnibus ERISA exclusion in bankruptcy, violates statutory rules of construction by effectively writing the

exemption scheme under §522 out of the Bankruptcy Code. Similarly, Shumate does not contest the Trustee's related argument that to find an omnibus federal exemption under 11 USC §522(b)(2) also violates rules of statutory construction because of the Bankruptcy Code's specific exemption scheme regarding pension benefits under 11 USC §522(d)(10)(E).

Accordingly, the Petitioner, John R. Patterson, Trustee, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this cause on August 12, 1991.

Respectfully submitted,

G. Steven Agee, Esq.
Counsel of Record
OSTERHOUDT, FERGUSON, NATT,
AHERON & AGEE, P.C.
1919 Electric Road, SW
Roanoke, VA 24018
(703) 774-1197

(4)

No. 91-913

In The
Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX - VOLUME I

G. Steven Agee
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OSTERHOUDT, FERGUSON,
NATT, AHERON
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1919 Electric Road, SW
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Counsel for Respondent

PETITION FOR CERTIORARI FILED
NOVEMBER 8, 1991

CERTIORARI GRANTED JANUARY 21, 1992

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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VOLUME II

The following decision, opinions, and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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2/27/87	Memorandum Opinion and Order confirming the Coleman Furniture Corporation Pension Plan, as amended and restated.
7/27/87	Motion to Compel Performance of Duty by Shumate.
7/27/87	Notice of Hearing by Shumate.
8/11/87	Answer to Motion to Compel Performance by Trustee.
8/12/87	Motion to Intervene by John R. Patterson, Trustee
8/20/87	Objection to Motion to Intervene by Shumate.
8/24/87	Order entered ordering that John R. Patterson, Trustee may intervene in this civil action and file such pleadings and take such other actions as he deems appropriate to protect his interests.
8/20/87	Responsive Pleading of John R. Patterson, Trustee.
8/20/87	Motion for Pre-Trial Conference by John R. Patterson, Trustee.
8/20/87	Motion to Withdraw Reference and Consolidate Cases by Patterson.

8/27/87	Order entered making John R. Patterson, Trustee a party to this suit.
9/16/87	Motion for Additional Facts to be Stipulated as Issues for Motion to Compel by Shumate.
9/15/87	Transcript of Stipulation of Fact Before the Honorable Glen M. Williams by Bridget Dickert.
9/21/87	Statutes and Cases Supporting Motion to Compel Performance of Duty by Shumate.
9/21/87	Brief of John R. Patterson, Trustee in Bankruptcy for Shumate.
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9/28/87	Reply Brief of Shumate.
10/08/87	Requests for Production of Documents by Patterson.
10/08/87	Requests for Admissions by Patterson.
10/08/87	Interrogatories by Patterson.
10/13/87	Petition by Trustee and Shumate.

10/13/87	Request for Admissions by Trustee.
11/09/87	Objection to Request for Admissions by Shumate.
11/09/87	Response to Request for Admission by Shumate.
11/09/87	Response to Request for Production of Documents by Shumate.
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11/13/87	Requests for Admissions by Patterson.
11/13/87	Interrogatories by Patterson.
11/17/87	Notice of Hearing by Creasy.
12/04/87	Order entered authorizing Creasy to direct the payment of $250,000.00 to be deposited with the Clerk's Registry Fund; ratifying, approving, and incorporating into this Order the Agreement between Creasy, Shumate, Patterson and the Plan; dismissing Creasy as a party defendant in the Adversary Proceeding; continuing this case.
12/16/87	Response of Interrogatories of

Patterson by Shumate.

12/16/87	Objections and Reponse to Request for Admissions and Answers to Request for Admissions by Shumate.
12/16/87	Court Hearing: Honorable Glen M. Williams presiding; Bridget Dickert OCR. Parties present by counsel for hearing on evidence in regard to Shumate's claim for pension benefits. Evidence presented. Argument presented.
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3/08/88	Motion to Reconsider and Amend Order by Shumate.
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4/14/88	Memorandum Opinion and Order granting Shumate's Motion to Reconsider and that the proceedings in this matter are stayed pending appeal.
4/22/88	Leave to Proceed on Appeal In Forma Pauperis from the District Court to the Court of Appeals.
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6/6/88	Judgment of the 4th Circuit denying Petition for permission to appeal the interlocutory order.
6/29/88	Motion for New Trial by Shumate.
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9/02/88	Final order entered ordering the Clerk to pay over to Patterson funds held by the Court; withdrawing the reference to B/K AP#7-87-0133 and consolidating such AP into this civil action; dismissing Shumate and Patterson as parties to this civil action; ordering that this order is final regarding Shumate's interest in Coleman Furniture Corporation Pension Plan and regarding any and all claims by Shumate and/or Patteson against Creasy as Coleman Furniture Corporation Plan Administrator and Coleman Furniture Corporation Trustee in Bankruptcy.
9/08/88	Shumate's Exhibit from 9/1/88

hearing.

9/08/88	Request for Leave to Proceed on Appeal in Forma Pauperis From the District Court to the Court of Appeals with Affidavit in Support of Motion by Shumate.
9/08/88	Motion to Stay Order by Shumate.
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9/20/88	Bankruptcy File received pursuant to this Court's Order of 9/2/88 withdrawing reference of AP#7-87-0133.
9/22/88	Appeal Record in 5 Volumns (Vol. V contains Exhibits for 12/16/87) forwarded to 4th Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	)
	)
JOSEPH B. SHUMATE, JR.	) FILED
	) JUL 27 1987
Plaintiff	) Joyce F. Witt,
	) Clerk
	) By /s/ R. Collins
v.	) Deputy Clerk
	)
	) Civil Action No.
	) 86-0272-R
ROY V. CREASY, TRUSTEE	)
and PLAN ADMINISTRATOR	)
of COLEMAN FURNITURE	)
PENSION PLAN	)

MOTION TO COMPEL PERFORMANCE OF DUTY

COMES NOW, Joseph B. Shumate, Jr., and request this honorable Court compel Roy V. Creasy, Trustee and Plan Administrator of Coleman Furniture Corporation Pension Plan to stop interfering with Shumate's rights protected under the Employee Retirement Income Security Act pursuant to 29 U.S.C., Section 1001 et. seq. and pay over to Shumate his rightful pension pursuant to

this Court's order dated February 27, 1987 confirming the Coleman Pension Plan as amended and restated December 1, 1984, and states reason for this request as follows:

1. The District Courts of the United States has exclusive jurisdiction in this matter pursuant to 29 U.S.C., Section 1132.

2. This Court approved Creasy's amendments to the Coleman Pension Plan on February 27, 1987.

3. Shumate was determined to be a participant in the Coleman Pension Plan.

4. The Trustee in the process of terminating the plan paid benefits to all participants in the plan that he could locate except Shumate on or by July 1, 1987.

5. Creasy has descriminated and interfered against Shumate denying him

the right to receive the pension which he is entitled to under the plan pursuant to 29 U.S.C., Section 1140.

6. Creasy has violated his fiduciary duties by refusing to pay over to Shumate his portin of the pension pursuant to 29 U.S.C., Section 1104.

7. Creasy has violated this court's order of February 27, 1987 by refusing to administer the plan according to the plan as amended and restated December 1, 1984.

8. Creasy has coercively interfered with Shumate's rights to receive a pension under the plan pursuant to 29 U.S.C., Section 1141.

Therefore, Shumate request this court order that Creasy pay over to Shumate his rightful pension, plus interest, legal fees and expenses and any other equitable relief this court deems appropriate.

Shumate also request this court find Creasy to be in contempt of this order of February 27, 1987 and penalize Creasy within the confines of 29 U.S.C., Section 1141.

JOSEPH B. SHUMATE, JR.
/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
1217 Memorial Dr.
Pulaski, Va. 24301
(703) 980-5030

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Roanoke Division)

ROY V. CREASY, Trustee	) FILED) Aug 11 1987
Plaintiff	) Joyce F. Witt,) Clerk) By /s/ R. Collins
v.	) Deputy Clerk)
	) RESPONSIVE) PLEADING)
COLEMAN FURNITURE CORPORATION PENSION PLAN	) Civil Action No.) 86-0272-R
Defendant	)

ANSWER TO MOTION TO COMPEL PERFORMANCE

COMES NOW, ROY V. CREASY, Trustee in Bankruptcy for Coleman Furniture Corporation and Plan Administrator of the Coleman Furniture Corporation Pension Plan ("Creasy"), by counsel, and for his Answer to the Motion to Compel Performance of Duty by Joseph B. Shumate, Jr. ("Shumate") states:

(1) Creasy admits that this Court has jurisdiction in this matter.

(2) Creasy admits the allegations contained in paragraphs 2 and 3 of the Motion.

(3) Creasy admits that he is in the process of terminating the Coleman Furniture Corporation Pension Plan (the "Plan"), and Signet Trust Company, at Creasy's direction, paid termination benefits in lump sum payments to most participants in the Plan that could be located on or about July 1, 1987, and Creasy has arranged for the purchase of annuity contracts for all of the other participants in the Plan except for Shumate.

(4) Creasy denies the allegations contained in paragraphs 5, 6, 7, and 8 of the Motion.

(5) All allegations in the Motion not specifically admitted are denied.

(6) Coleman Furniture Corporation

("Coleman") adopted the Plan effective December 1, 1963 and subsequently amended it several times including a restatement effective December 1, 1976. This 1976 version of the Plan is referred to for convenience in this pleading as the "Plan", and a copy of it has been previously been filed as an exhibit in this case. The Plan was in effect when Coleman filed its Petition under Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 et seq.) in November, 1982.

(7) Coleman's bankruptcy case was converted to a case under Chapter 7 of the Bankruptcy Code in May, 1984, and Roy V. Creasy was duly appointed Trustee in Bankruptcy for Coleman.

(8) Creasy was appointed Plan Administrator of the Plan by order of this Court entered May 13, 1986.

(9) Creasy adopted a restatement of

the Plan (the "Restatement") including certain amendments required for continued qualification of the Plan for favorable income tax benefits and to facilitate termination of the Plan and distribution of Plan assets pursuant to an order of this Court entered February 27, 1987. A copy of the Restatement has previously been filed as an exhibit in this case. Except for those sections of the Restatement listed in the second paragraph of the Introduction of the Restatement, the Plan rather than the Restatement applies to Shumate.

(10) Shumate was hired, for purposes of the Plan, by Coleman on September 5, 1951, and his employment continued, except for a leave of absence because of military service, until it was terminated on February 24, 1983. At the time of his termination and for some period prior to termination, Shumate was president of

Coleman and received the highest compensation of any participant in the Plan.

(11) Shumate has thirty years or more of Benefit Accrual service under the terms of the Plan.

(12) Section 8.1 of the Plan provides (as required by ERISA and the Internal Revenue Code) that the normal form of normal retirement benefit under the Plan for an unmarried participant such as Shumate is a life annuity beginning at age 65.

(13) The actuary, Mercer-Meidinger-Hansen, has determined that Shumate is entitled to a normal retirement benefit from the Plan in the form of a monthly pension beginning at age 65 in the amount of $3,540.48, and that the present value (or lump sum value) of this accrued benefit as of July 1, 1987, is $200,948.44.

(14) Section 9.02 of the Restatement states the rights and obligations of the participants in the Plan and the plan administrator in the event of termination of the Plan. It provides in part as follows:

> Subject to the restrictions of ERISA, as it may be amended, when the calculations [of the participants' benefits by the actuary] shall be completed, ... at the direction of the Plan Administrator, the appropriate portion of the Fund shall be liquidated and each of their [the Participants] interests distributed to them in the form of annuity contracts, annuity payments, installments or in a lump sum as determined by the Plan Administrator ...

This provision supersedes §14.3(d) of the Plan, and the primary difference is that the Restatement permits Creasy to direct payment of a participant's termination benefits in a lump sum if that ERISA permits a lump sum payment and Creasy determines that a lump sum payment will facilitate termination of the Plan.

(15) Creasy is required by ERISA to pay Shumate's benefits from the Plan in annuity form through the purchase from an insurer of a contract to provide the annuity, except that Creasy may honor "a participant's post-termination election of an optional annuity form payable under the plan ... or [purchase] an annuity which permits the participant or beneficiary to elect to receive his or her benefits in a form that is provided by the plan..." 29 C.F.R. §2617.4 issued under Section 4041 of ERISA (29 U.S.C. §1341) by the Pension Benefit Guaranty Corporation ("PBGC") (a copy of which is attached as Exhibit A); see also Internal Revenue Code §§ 401(a)(11) and 417(e) and Treas. Reg. § 1.417(e)-1T.

(16) Article IX of the Plan provides for optional forms of benefit payments including other types of annuities.

Section 9.4 provides, in part, "Subject to the consent of the Company and the Trustee, a Participant may receive an Actuarial Equivalent of his pension in such other manner as he may elect, including a lump sum."

(17) Shumate filed his Petition under Chapter 11 of Title 11 of the U.S. Code on June 1, 1984, which case was later converted to a case under Chapter 7 of Title 11 of the U.S. Code, and John R. Patterson ("Patterson") was duly appointed trustee in bankruptcy for Shumate.

(18) By letter to Creasy dated October 29, 1986, a copy of which is attached as Exhibit B, Patterson claimed title to Shumate's benefits from the Plan.

(19) On April 24, 1987, Patterson filed a Turnover Complaint in the United States Bankruptcy Court for the Western District of Virginia asking that the Court

order Creasy to turn over to Patterson all money due to Shumate from the Plan.

(20) While Patterson has asserted a claim to Shumate's benefits under the Plan, Internal Revenue Code § 401(a)(13) provides that the trust holding the assets of the Plan will not be qualified for favorable income tax benefits unless the Plan provides that benefits may not be assigned or alienated. This requirement is satisfied by § 16.1 of the Plan.

(21) By letter to Creasy dated July 24, 1987, a copy of which is attached as Exhibit C, Patterson, as trustee in bankruptcy on behalf of Shumate, has attempted to elect to receive Shumate's benefits from the Plan in a lump sum.

(22) Creasy has not offered Shumate or Patterson the opportunity to elect a lump sum payment of Shumate's termination benefits from the Plan.

(23) Creasy is not required to offer a lump sum election to Shumate because §9.02 of the Restatement and §9.4 of the Plan as cited above permit but do not require Creasy to offer a lump sum to Shumate.

(24) Pursuant to §5.3 of the Plan Shumate may elect to receive early retirement benefits determined in accordance with §6.3 of the Plan in lieu of normal retirement benefits beginning after completing 30 years of Benefit Accrual Service "on an early retirement date which may be the first day of any subsequent month prior to his normal retirement date."

(25) By letter dated September 12, 1986, a copy of which is attached as Exhibit D-1, Shumate was offered the opportunity to elect to receive early retirement benefits. Copies of correspondence related to this election are

attached as Exhibits D-2, D-3, D-4, D-5, D-6, D-7, D-8.

(26) Section 303 of the Retirement Equity Act of 1984 provides that participants in qualified plans who meet certain conditions shall have the right to elect to be covered by the joint and survivor annuity requirements of the Retirement Equity Act. Shumate meets these conditions, and he has been offered the opportunity to make this election. Attached as Exhibit E is a copy of the notice of election form which was sent to Shumate on December 18, 1986. Shumate has not made an election, and the election period expires on his "annuity starting date" as defined in §417(f)(2) of the Internal Revenue Code. 26 U.S.C. §417(f)(2).

(27) As permitted by regulation of the PBGC (29 C.F.R. § 2617.4(c)(2)), the

actuary acting on behalf of Creasy has attempted to locate an insurance company that will issue an annuity contract that would permit Shumate to elect to receive his benefit in the optional forms provided by the Plan. Attached as Exhibit F is a copy of the specifications for Shumate's annuity contract prepared by the actuary for submission to insurance companies. The actuary has received a quote for a contract that would permit Shumate to elect to receive his benefit in annuity form provided by the Plan and also in a lump sum, if the election of a lump sum is made by November, 1988.

(28) The actuary estimates that the cost of an annuity contract providing Shumate with the required options at this time is approximately $204,000.

(29) If the purchase of the annuity contract is delayed by this proceeding,

then the cost could increase, and the actuary estimates that the cost of an annuity contract for Shumate could be as much as $300,000 if interest rates decline.

(30) Creasy does not know whether Patterson has the right to make the elections described in paragraphs 20, 24 and 26, above, on behalf of Shumate.

(31) Creasy does not know whether the benefits of Shumate should be distributed to Shumate or to Patterson nor does he know the form in which the benefits should be paid.

(32) Creasy claims no beneficial interest in Shumate's interest in the Plan but is a mere stakeholder.

(33) In order to terminate the Plan Creasy requested a determination from the Internal Revenue Service in January, 1986, that the termination of the Plan would not adversely affect its qualification for

Federal tax purposes. By letter dated April 7, 1987, a copy of which is attached as Exhibit G, Teddy R. Kern, district director of the IRS, notified Creasy that the proposed termination would not adversely affect the Plan's qualification for Federal tax purposes if the termination were executed in accordance with information submitted during the request process.

(34) One of the requirements of the IRS determination letter is that the Plan be amended to comply with changes in the law governing qualified plans that occur and apply to the Plan prior to the final distribution of Plan assets. See the reference to Notice 86-13 in the letter, Exhibit G. Creasy will be required to amend the Plan or lose the qualification for favorable tax benefits for the Plan and Shumate if the final distribution does not

occur before such changes in the law apply to the Plan, which date may be as early as December 1, 1987, the beginning of the next Plan year.

(35) While the position of the IRS is not known, Creasy is concerned that a delay in distributing Shumate's benefits in some form will jeopardize the validity of the determination letter. If so, then a new application for a determination letter may be required to avoid the loss of qualified status for the Plan.

(36) 29 U.S.C. § 1341 as in effect with respect to the Plan in December, 1985 required the Plan to receive a Notice of Sufficiency from the Pension Benefit Guaranty Corporation ("PBGC") before terminating the Plan and distributing the Plan assets. Upon application by Creasy, the PBGC issued a notice of sufficiency to the Plan dated March 20, 1987, a copy of

which is attached as Exhibit H.

(37) The notice of sufficiency issued by the PBGC requires Creasy as Plan Administrator "to complete the termination of the Plan in accordance with Subtitle C of Title 4 of ERISA" within ninety days. Pursuant to requests by Mr. Creasy the PBGC has extended the deadline for the distribution of Plan assets to participants until November 20, 1987. A copy of the request and acknowledgement of the extended deadline is attached as Exhibit I.

(38) While the position of the PBGC is not explicitly stated, it appears that the failure to distribute Plan benefits within the specified period would require a new application for PBGC approval which would be governed by a new procedure established by the Single-Employer Pension Plan Amendments Act of 1986 including the requirement of a 10% excise tax on all

amounts reverting to Creasy as Trustee in Bankruptcy for Coleman.

(39) If the assets of the Plan cannot be distributed before the end of the current Plan year, November 30, 1987, then Creasy will be required to file additional annual reports to the Department of Labor and to pay additional premiums to the PBGC, which will require additional time and expense to the detriment of the Coleman bankruptcy estate.

(40) Creasy could complete the distribution of Plan assets before November 30, 1987, if he is permitted to distribute Shumate's benefits, in a form in accordance with the terms of the Plan and federal law, by that date.

(41) No detriment or prejudice to the interests of either defendant will occur if Creasy is permitted to deposit with the Court an annuity contract providing

Shumate's benefits in accordance with the terms of the Plan and federal law or a lump sum sufficient to fund his benefits.

THEREFORE, Creasy prays that:

A. Patterson be required to answer and plead or be permitted to intervene in this case;

B. Shumate and Patterson be required to settle between themselves the rights to Shumate's benefits under the Plan, payable in a form that will not adversely affect Creasy or other participants in the Plan and that Creasy be discharged from liability;

C. Creasy be permitted to deposit with the Court an annuity contract providing Shumate's benefits under the Plan in the annuity forms provided by the Plan, if such a contract is available before November 20, 1987;

D. If an annuity contract acceptable

to the Court or the parties is not available before November 20, 1987, Creasy be permitted to deposit with the Court a lump sum in the amount of $300,000 to be used for the purchase of an annuity contract or payment of a lump sum as determined by the Court with the amount in excess of that required to fund Shumate's benefits in either form to be paid to Creasy as Trustee in Bankruptcy for Coleman Furniture Corporation and not as Plan Administrator of the Plan after the issues before the Court are resolved so that Creasy may complete the termination of the Plan in accordance with the requirements of ERISA and the Pension Benefit Guaranty Corporation.

MOTION FOR AN ORDER UNDER RULE 11 OF THE RULES OF CIVIL PROCEDURE

(42) Shumate is a party to the

adversary proceeding in Bankruptcy Court referred to in paragraph 19 above, and he is aware that Creasy has not paid Shumate's benefits because of that suit.

(43) The allegations in paragraphs 5, 6, 7 and 8 of Shumate's Motion to Compel Performance and the request for Creasy to be held in contempt are not well grounded in fact and are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and are interposed to harass and to cause unnecessary delay and needless increase in the cost of litigation.

THEREFORE, Creasy asks that Shumate be ordered to pay Creasy as trustee in bankruptcy for Coleman the amount of the reasonable expenses incurred because of these allegations and requests, including reasonable attorney's fees.

ROY V. CREASY, Trustee

By: /s/ Harry S. Rhodes
Of Counsel

Harry S. Rhodes, Esquire
BERSCH & RHODES, P.C.
Suite 640 Colonial Plaza
P.O. Box 1529
Roanoke, Virginia 24007
(703) 345-7336

Counsel for Plaintiff

(Certificate of Service Omitted In Printing)

Exhibit A

[¶ 15,447C]

§2617.4 Requirement for annuities.

(a) *General rule.* Except as provided in Paragraph (b) of this section, when a plan is closed out under Subpart C of this part, any benefit that is payable as an annuity under the provisions of the plan must be provided in annuity form either through the purchase from an insurer of a contract to provide the annuity or by the PBGC under Subpart D of this part.

(b) *Exceptions.* A benefit that is payable as an annuity under the provisions of a plan need not be provided in annuity form as required by Paragraph (a) of this section, if--

(1) The monthly amount of the benefit is less than the smallest monthly benefit amount normally provided by an insurer;

(2) The present value of the benefit,

determined in accordance with §2619.26 of this part, is $1,750 or less; or

(3) The plan provides for an alternative form of distribution, and the plan administrator submits a written statement to the PBGC in which he or she certifies that--

(i) The participant elected, in writing, the alternative form of distribution;

(ii) The participant was informed, in writing, before he or she made the election, of the estimated amounts of the annuity and of the alternative form of distribution, with reference to any risks attendant to the alternative form; and

(iii) The participant was notified, in writing, before he or she made the election, that his or her election would not be given effect unless the plan should close out under a Notice of Sufficiency,

and that the PBGC does not guarantee the benefit payable in the alternative form.

(c) *Required form of annuity.* The annuity required by Paragraph (a) of this section must be purchased in the form that would be paid under the plan upon retirement, unless before the date of termination, the participant or beneficiary elected an optional form of annuity payable under the plan; if such an election was made, the annuity must be provided in the optional form elected. This paragraph shall not preclude the plan administrator from--

(1) Honoring a participant's post-termination election of an optional annuity form payable under the plan, if the value of the annuity in the optional form is no greater than the value of the annuity in the form to which the participant was entitled on the date of plan termination;

or

(2) Purchasing an annuity which permits the participant or beneficiary to elect to receive his or her benefit in a form that--

(i) Is provided by the plan; or

(ii) Provides for a series of periodic payments for the life of the participant or beneficiary, if the right of election does not increase the cost of the annuity.

[¶ 15,447D]

Exhibit B

JOHN R. PATTERSON
Attorney at Law
Dominion Bank Building
Roanoke, Virginia 24011

Suite 910 Area Code 703
Telephone 342-5157

October 29, 1986

Roy V. Creasy, Esquire
WILSON, VOGEL, & CREASY
P. O. Box 2420
Roanoke, Virginia 24010

Re: Coleman Furniture Corporation

Dear Roy:

I understand that Harry Rhodes has now determined that Joe Shumate is entitled to $167,325.00 from the Coleman Furniture Corporation Pension Plan. You are aware that I am Trustee in Bankruptcy for Joseph B. Shumate, Jr. and I, therefore, would appreciate it if you would write me a letter advising me that you will make no distribution of these funds to Mr. Shumate but will disburse them to me as his Trustee

in Bankruptcy as I claim title to those funds and certainly do not want them to be disbursed to Mr. Shumate and then have to pursue him to gain control of those funds.

Yours very truly,

John R. Patterson

JRP/mjm

Exhibit C

JOHN R. PATTERSON
Attorney at Law
Dominion Bank Building
Roanoke, Virginia 24011

Suite 910 **Area Code** 703
Telephone 342-5157

July 24, 1987

Roy V. Creasy, Esquire
WILSON, VOGEL & CREASY
P. O. Box 2420
Roanoke, Virginia 24010

Re: Coleman Furniture Corporation
Pension Plan

Dear Roy:

On December 31, 1986, I wrote you a letter regarding your pending distribution of the assets of the Coleman Furniture Corporation Pension Plan. As Trustee in Bankruptcy for Joe B. Shumate, Jr., I deem myself to now be the Participant and I elect under the terms of the Pension Plan to receive the termination distribution in a lump sum.

Yours very truly,

/s/ John R. Patterson
John R. Patterson

JRP/mjm
COPY SENT TO: Joseph B. Shumate, Jr.
G. Steven Agee, Esquire

Exhibit D-1

LAW OFFICES
BERSCH & RHODES
A Professional Corporation
Suite 640, Colonial Plaza
P. O. Box 1529
Roanoke, Virginia 24007

Robert S. Bersch (703)345-7336
Harry S. Rhodes
Alice D. Burlinson File No.

September 12, 1986

Joe B. Shumate, Jr.
1217 Memorial Drive
Pulaski, VA 24301

RE: Coleman Furniture Corporation
Pension Plan
Early Retirement Benefits

Dear Mr. Shumate:

We represent Mr. Roy V. Creasy, Trustee, the Plan Administrator of the Coleman Furniture Corporation Pension Plan. According to the records of the Plan, you are eligible for early retirement benefits from the Plan.

The enclosed notice includes information about the form and amount of your early retirement benefits. If you

choose not to receive your early retirement benefits, then you will receive normal retirement benefits at age 65. The actuarial values of your early and normal retirement benefits are the same, but the monthly payments of normal retirement benefits will be slightly higher because those payments will begin later.

You may choose to receive early retirement benefits by completing and returning the enclosed benefit election form. If you do not want your early retirement benefits, please sign the enclosed copy of this letter and mail it to me at the address shown on the letterhead.

Note that the signatures on the benefit election form must be witnessed by a notary public. This is very important.

Very truly yours,

BERSCH & RHODES, P.C.

Harry S. Rhodes

HSR/dp
cc: Mr. Roy V. Creasy, Trustee

I do not elect to receive early retirement benefits. I will receive normal retirement benefits when I attain age 65.

____
Participant

Exhibit D-2

LAW OFFICES
BERSCH & RHODES
A Professional Corporation
Suite 640, Colonial Plaza
P. O. Box 1529
Roanoke, Virginia 24007

Robert S. Bersch (703)345-7336
Harry S. Rhodes
Alice D. Burlinson File No.

October 20, 1986

Joe B. Shumate, Jr.
1217 Memorial Drive
Pulaski, VA 24301

RE: Coleman Furniture Corporation
Pension Plan Early Retirement

Dear Participant:

On September 12, 1986, a package of materials was mailed to you concerning your eligibility for early retirement benefits for the Coleman Furniture Corporation Pension Plan. As of this date, we have not heard from you.

Although the period to choose the type of benefit you want runs for 90 days, we would encourage you to respond quickly so

that benefits may begin being paid to you.

If you choose not to receive early retirement benefits, but would prefer to wait until your normal retirement date, you may do so. We would appreciate your letting us know whether or not you choose to receive early retirement benefits.

Should you have any questions, please let us know.

Very truly yours,

BERSCH & RHODES, P.C.

Alice G. Burlinson

AGB/dg

cc: Roy V. Creasy, Trustee

Exhibit D-3

December 29, 1986

Ms. Alice G. Burlinson
Bersch & Rhodes
P. O. Box 1529
Roanoke, Va. 24007

Ref: Coleman Furn. Pension Plan

Dear Ms. Burlinson:

In response to your letter of December 18, 1986, I shall appeal your decision on Paragraph 1 of your letter to the Pension Board Guaranty Corporation for the following reasons:

1. The Pension Committee approved my taking part of my salary in notes for the years 1981 and 1982.
2. The Board of Directors also approved my taking notes for part of my salary in years 1981 and 1982.
3. Such action was for the benefit

of the Corporation.

4. Such action was for the benefit of all employees of Coleman Furniture.

In reply to your paragraph 2, I shall take my early retirement as of June 1, 1984 using the straight life method with the understanding that these payments will be made directly to me.

Yours very truly,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
1217 Memorial Dr.
PUlaski, Va. 24301

Exhibit D-4

85116

January 5, 1987

Mr. Joseph B. Shumate, Jr.
1217 Memorial Drive
Pulaski, VA 24301

Re: Coleman Furniture Corporation
Pension Plan

Dear Mr. Shumate:

In your letter to Ms. Burlinson of this firm dated December 29, 1986, you stated that you wish to take early retirement benefits if these payments would be made directly to you. Because Mr. Creasy has notice of your personal bankruptcy, he does not believe that it is proper to pay these benefits directly to you, but rather to your bankruptcy trustee or the court.

Unless we hear to the contrary from you, we understand that you do not elect to

receive early retirement benefits at this time because your early retirement benefits would not be paid directly to you.

Please contact me if you have any questions.

Very truly yours,

BERSCH & RHODES, P.C.

Harry S. Rhodes

HSR:a
cc: Roy V. Creasy, Trustee

Exhibit D-5

January 7, 1987

Mr. Roy V. Creasy
P. O. Box 2420
Roanoke, Va. 24010

Re: Coleman Furniture Corp.
Pension Plan
Case No. 86-0272-R

Dear Mr. Creasy:

This is in response to a letter dated December 31, 1986 addressed to you, copy to me, from Mr. Patterson pertaining to my pension from Coleman Furniture.

Mr. Patterson is estopped from taking possession of my pension by Statute. (11 U.S.C., section 522).

If you cannot comply with my directive dated December 29, 1986 to your agent, Bersch & Rhoades, please advise me of the Statute(s) you will rely upon to deny me this request.

I will not take early retirement until my

pension payments will be made directly to me.

Awaiting your response, I am.

Yours very truly,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
1217 Memorial Dr.
Pulaski, Va. 24301

(703) 980-5030

cc: Honorable Glenn M. Williams, Judge
U.S. District for Western District of Va.
P. O. Box 339
Abingdon, Va. 24210

Mr. John R. Patterson
Suite 910
Dominion Bank Bldg.
Roanoke, Va. 24011

Bersch & Rhoades
P. O. Box 1529
Roanoke, Va. 24007

Exhibit D-6

February 10, 1987

Mr. Roy V. Creasy
P. O. Box 2420
Roanoke, Va. 24010

Ref: Joseph B. Shumate, Jr.
Coleman Furniture Corp.
Pension Plan
Case No. 86-0272-R

Dear Mr. Creasy:

On January 7, 1987 I wrote to you pertaining to my personal pension I am entitled to from Coleman Furniture. As of this date I have not received a reply from - you and request that you do so in the near future.

Awaiting your response, I am.

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
1217 Memorial Dr.
Pulaski, Va. 24301

(703) 980-5030

Exhibit D-7

February 18, 1987

85116

Mr. Joseph B. Shumate, Jr.
1217 Memorial Drive
Pulaski, VA 24301

Dear Mr. Shumate:

Mr. Creasy has asked that I respond to your letter of February 10, 1987 which refers to your letter of January 7, 1987.

You have inquired as to the statutory authority by which Mr. Creasy refuses to pay your benefits under the Coleman Furniture Corporation Pension Plan directly to you. In your letter of January 7, you stated Mr. Patterson is estopped from taking possession of your pension benefits based on 11 U.S.C. Section 522 which deals with exemptions. You further stated that you would not elect to receive early retirement until your payments would be made directly to you.

Mr. Creasy believes Section 542, dealing with turnover provisions, controls in this instance. Since Mr. Creasy is aware of your personal bankruptcy he intends to turn over your assets to Mr. Patterson when the benefits based on the plan termination are distributed. The issue of payment of pension plan benefits in the course of bankruptcy proceedings has been litigated extensively with varying decisions. As a result, Mr. Creasy feels unable to make the payments directly to you at this time.

Very truly yours,

BERSCH & RHODES, P.C.

Harry S. Rhodes

HSR/B/lj

cc: Roy V. Creasy, Trustee

Exhibit D-8

February 23, 1987

Ms. Alice G. Burlinson
Bersch & Rhodes
P. O. Box 1529
Roanoke, Va. 24007

Dear Ms. Burlinson:

In response to your letter of February 18, 1987, this is to advise that I did not propose to take my retirement until such time it can be paid to me directly. Until such time I am converted, dismissed, or this matter is adjudicated, I expect the Plan Administrator and/or Trustee of the Coleman Furniture Pension Fund to hold my funds and pay them out to no one.

I shall hold the person violating my directive responsible for any damages to me in this matter.

Yours very truly,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

1217 Memorial Drive
Pulaski, Va. 24301

cc: Mr. Roy V. Creasy
P. O. Box 2420
Roanoke, Va. 24010

Exhibit E

QUALIFIED PRE-RETIREMENT
SURVIVOR ANNUITY ELECTION NOTICE

TO: Participants in the Coleman Furniture Corporation Pension Plan who:

(a) Had at least one hour of service under the Plan on or after December 1, 1976,

(b) Do not have an hour of service after August 22, 1984,

(c) Had at least ten years of service and a vested interest in a benefit from the Plan, and

(d) Were alive on August 23, 1984, and had not begun to receive retirement benefits on that date.

The qualified pre-retirement survivor annuity ("QPSA") rules of the Retirement Equity Act of 1986 ("REA") do not apply to you unless you choose to have them apply. This notice is intended to explain this

choice.

The QPSA rules found in Sections 103 and 203 of REA provide that if a vested participant dies prior to eligibility for payment of retirement benefits and is survived by his or her spouse, then the surviving spouse shall receive a "qualified pre-retirement survivor annuity." A qualified pre-retirement survivor annuity is monthly payments beginning when retirement benefits would have begun if the participant had survived.

The QPSA rules also provide that the participant's spouse must sign a written consent before the participant's benefit payments can be made in some form, such as a lump sum, other than a QPSA.

This notice cannot describe all of the details of the QPSA rules or their effect on you, if they were to apply to you. The following is a brief discussion in general

terms of the possible effects of your choice for or against QPSA coverage.

If you elect QPSA coverage and you are married at the time of your death, then your spouse will receive a QPSA beginning when you would have been eligible to receive early or normal retirement benefits. Also, once you elect QPSA coverage, if you are married, your spouse must agree if you want to receive your benefits in a lump sum, a life annuity or some other form of benefits other than a QPSA. Furthermore, the cost of the QPSA may reduce the amount of your monthly retirement benefits.

If you do <u>not</u> elect QPSA coverage and you die before you are eligible to receive your retirement benefits, your spouse will not receive anything from the Plan. Also, if you do not elect QPSA coverage, you will not be required to get your spouse's

consent to the payment of your benefits in a lump sum, life annuity or some other form of benefit other than a QPSA.

There are two other factors to consider. First, if the present value of your retirement benefits is less than $3,500, the spousal consent rules will not apply, regardless of whether you do or do not elect QPSA coverage. Second, the amount of a lump sum benefit payable to you because of the termination of the Plan will not be affected by this election.

In most cases, you would be advised to elect QPSA coverage unless you wish to avoid obtaining spousal consent to the payment of your benefits. The reason is that the Pension Plan does not pay any benefit if you die before retirement age. If you elect QPSA coverage your spouse will receive benefits if you die before retirement age.

Please consider this election carefully. If you have any questions, please call Alice Burlinson or Harry Rhodes at (703) 345-7336 during business hours, or write them at P.O. Box 1529, Roanoke, Virginia 24007.

Please make your election by completing the bottom portion of this form and sending it to Harry S. Rhodes at the above address. If your election form is not received by January 22, 1987, you will be presumed to have elected <u>not</u> to be covered by the QPSA rules.

____
Name (please print)

____
Address

CHOOSE ONE;

( ) I elect to be covered by the qualified pre-retirement survivor annuity ("QPSA") rules.

( ) I elect <u>not</u> to be covered by the qualified pre-retirement survivor annuity ("QPSA") rules.

____
Signature of Participant

____
Date

Exhibit F

WILLIAM M. MERCER-MEIDINGER-HANSEN, INC.
COLEMAN FURNITURE CORPORATION
ANNUITY BUYOUT SPECIFICATIONS

We are requesting non-participating single premium immediate and deferred annuity quotes based on the attached census data and specifications. These annuities are for Coleman Furniture Corporation terminating qualified defined benefit pension plan.

- Premium Receipt Date: June 15, 1987
- Contract Payment Commencement Date: July 1, 1987. This is the date your contract will become responsible for payments to retirees and beneficiaries.
- Commissions: None
- State of Issue: Virginia
- Premium Tax State: Virginia
- A copy of the plan document is available upon request.

- Data Specifications: Hard copy information is enclosed. The data have been thoroughly edited and reviewed. Consequently, the data are highly reliable. While data error is possible, we do not envision any substantial corrections.
- Deaths Before Payment Commencement Date: Your quote must allow for premium refund to the pension trust for deaths which occur among participants or beneficiaries before the Contract Payment Commencement Date, currently set at July 1, 1987. Note this means we wish the refund on all single life deferred and immediate annuities and the co-annuitant portion of a joint life annuity only to the <u>contract's</u> initial payment commencement date. We are <u>not</u> seeking a refund of premium feature for

annuitants who die after July 1, 1987.

- Small Annuity Limits: If it is necessary to pay some small benefits less frequently than monthly still feel free to quote, but specify this in your response.
- Deferred vs. Immediate Annuities: Please separate your quotes by immediate and deferred annuities. Indicate if you will be willing to accept the combined group or only one group or the other. If you can bid only on one group, and feel you can be competitive, feel free to do so.
- Payor Function: The insurance company will provide all payor functions.

DEFERRED ANNUITY SPECIFICATIONS

The following minimum provisions must be included in the deferred annuity being requested. If you are <u>exceeding</u> these provisions for pricing convenience, please

indicate when you send your quote.

- Normal Form of Annuity: Straight Life. All other forms are actuarially equivalent to the normal form.
- Normal Retirement Date: First of the month coincident with or next following the participant's 65th birthday.
- Early Retirement Eligibility: Early retirement is available to participants on the first of the month following completion of 30 or more years of service. The person for whom an annuity is requested, already has 30 years of service.
- Early Retirement Benefit Reductions: The accrued benefit is reduced actuarially.
- Delayed Retirement: The benefit at normal retirement is actuarially increased.

- o Disability Benefits: Your annuities will not provide any specific disability benefits.
- o Actuarial Equivalence: 1971 Group Annuity Mortality Table for males set back one year for participants and set back five years for contingent annuitants with interest as follows:
  - (a) for the lump sum option the lesser of 7½% or the applicable PBGC deferred interest rates in effect on the preceding December 1, prior to payment.
  - (b) for all other purposes, 6%.
- o Optional forms available under the deferred annuity are:
  1. A 50%, 75% and 100% Joint and Survivor annuity may be elected by the participant. In this option, the monthly benefit decreases only if the

participant predeceases the beneficiary.

  2. A Period Certain and Life annuity for 10 years.
  3. Lump sum.

  Should the participant elect an optional annuity in which the designated beneficiary is not the participant's spouse, the present value of payments to the participant must be 50% or more of the total present value of total expected payments to the participant and his beneficiary.
- o Pre-retirement Death Benefit: Your contract must offer the REA pre-retirement death benefit.
- o Proof of Age: Please specify in your quote any particular proof or age or other requirements necessary to implement your annuities.

- Your premium quotes must include all expenses, benefits and taxes. That is, we want the bid to be all inclusive.
- All quotes must be in accordance with these specifications. Any item your company cannot accommodate must be disclosed in writing before a binding acceptance is made by the client.

Exhibit G

Internal Revenue Service
District Director

Department of the Treasury

31 Hopkins Plaza
Baltimore, MD 21201-0000

Employer Identification Number:
54-0176030

Date: April 7, 1987

File Folder Number: 540000293

ROY V. CREASY, TRUSTEE
IN BANKRUPTCY
c/o HARRY S. RHODES
BERSCH & RHODES PC
P. O. BOX 1529
ROANOKE, VA 24007

Person to Contact:
Fred A. Handelman

Contact Telephone Number:
(301)962-3492

Plan Name:
Coleman Furniture Corporation Pension Plan

Plan Number: 001

Dear Applicant:

We have considered the information you sent us and have determined that your termination of this plan does not adversely affect its qualification for Federal tax purposes. Please note that this is not a determination regarding the effect of other

Federal or local statutes.

The enclosed document describes the impact of Notice 86-13. Even though you have terminated this plan, we would like to remind you of certain filing obligations. The related tax-exempt trust, custodial account, or other payers who are responsible for making payments may be required to file information returns on Forms W-2P or 1099R, with Forms W-3 or 1096, respectively, for amounts paid or made available to any individual or beneficiary.

In addition, you must continue to file a Form 5500 series return annually until all plan assets are distributed. The last return required is the one filed for the year in which distribution is complete. Be sure to write 'Final Return' across the top of this return.

Proposed date of termination is July

19, 1984.

We have sent a copy of this letter to your representative as indicated in the Power of Attorney.

Your plan's qualified status will be adversely affected if plan assets are returned to you before the plan's liabilities to all plan participants are satisfied by the purchase of guaranteed annuity contracts, or making of cash distributions as soon as administratively feasible. When you receive these excess plan assets, you should notify the Service of the date(s) you receive such assets and the date(s) guaranteed annuity contracts were purchased, or the date(s) of the payment of the cash distributions for all participants.

The information on the enclosed addendum is an integral part of this determination. Please be sure to read and

keep it with this letter.

45 Letter 1132(DO/CG)

ROY V. CREASY TRUSTEE IN BANKRUPTCY

Please keep this letter in your permanent records. If you have any questions concerning this matter, please contact the person whose name and telephone number are shown above.

Sincerely yours,

/s/ Teddy R. Kern
Teddy R. Kern
District Director

Enclosures:
Publication 794
OPWBP 515

ROY V. CREASY TRUSTEE IN BANKRUPTCY

Information on the date and amount of the reversion and distributions, and a copy of the approval of the change in funding method (if applicable) should be forwarded to the attention of:

Reversion Coordinator
EP/EO Technical Staff

P. O. Box 13163
Baltimore, Md. 21203

This determination is subject to your adoption of the proposed amendments submitted in your or your representative's letter dated Nov. 11, 1987. The proposed amendments should be adopted on or before the date prescribed by the regulations under Code section 401(b).

Exhibit H

Pension Benefit Guaranty Corporation
2020 K Street, N.W.,
Washington,D.C. 20006-1806

Mar 20 1987

EIN/PN: 54-0176030-001

In reply refer to:
07764700

Name of Plan: Coleman Furniture Corporation Pension Plan

Mr. Roy V. Creasy
Trustee
Wilson, Vogel, Creasy & Hambrick
P. O. Box 2420
Roanoke, Virginia 24010-2420

Dear Mr. Creasy:

The Pension Benefit Guaranty Corporation (PBGC) received the information required to demonstrate sufficiency relating to the termination of the above-identified Plan. Based on this, the Corporation is issuing the enclosed Notice of Sufficiency in accordance with Section 4041(b) of the Employee Retirement Income Security Act of 1974 (ERISA). It is the plan

administrator's responsibility to allocate assets in accordance with Section 4044 of ERISA. A reasonable interest assumption must be used to value lump sums under 29 CFR Part 2619.26. The Notice of Sufficiency is not deemed an expression of opinion by the PBGC as to the reasonableness of any proposed valuation rates to be utilized in the allocation of assets under Section 4044 of ERISA, including lump sums.

Upon receipt of the Notice of Sufficiency, you have 90 days to complete the termination of the Plan in accordance with Subtitle C, Title IV of ERISA. Pursuant to the attached Regulation of Administrative Review of Agency Decisions, assets may not be distributed prior to 30 days from the date of this letter. As of the date of plan termination, if the plan provides for reversion to the employer of

any assets remaining after all plan benefits have been provided, PBGC expresses no opinion as to whether this provision is legally valid. However, if the Plan is contributory, the portion of residual assets attributable to employee contributions must be allocated to eligible participants as provided in PBGC's regulation of Allocation of Assets.

Please note that in order to remove your plan from the PBGC-1 Form and premium billing mailing list, Subpart C of 29 Part 2617, requires you to submit to PBGC within 60 days after the completion of the distribution of plan assets, a certified statement that the plan assets were allocated in accordance with Section 4044 of ERISA, and also include the following information:

(1) For each participant or beneficiary to whom distribution was made--

(a) Name;

(b) Address;

(c) Telephone number;

(d) Sex;

(e) Date of birth;

(f) Social security number;

(g) The amount of benefit provided and unless previously submitted, the basis for computing the amount;

(h) The cost of providing the benefit;

(i) The form in which the benefit was provided; and

(j) The date the assets were distributed.

(2) The total cost of all benefits provided by method of distribution, the number of participants in each distribution category, and a reconciliation of any differences from

the proposed distribution information previously submitted.

(3) If annuity contracts were purchased from an insurer, the name of the insurer and the policy number(s); and

(4) The place or places where plan records will be held.

Sincerely,

/s/ Denese Thomas
Denese Thomas
Case Officer
Case Processing Division 2/4
(202) 778-8872

Enclosure

cc: Alice Burlinson

Pension Benefit Guaranty Corporation
2020 K Street, N.W.,
Washington, D.C. 20006-1806

Date Mar 20 1987

NOTICE OF SUFFICIENCY

Name of Plan: Coleman Furniture Corporation Pension Plan

Date of Termination: December 31, 1985

Based on the information you supplied us, we hereby find that the assets of this Plan will be sufficient as of your proposed date of distribution to discharge when due all obligations of the Plan with respect to guaranteed benefits.

This finding is made under the Employee Retirement Income Security Act of 1974, Section 4041(b), 29 USC 1341(b).

Pursuant to the enclosed Regulation on Administrative Review of Agency Decisions, assets may not be distributed prior to 30 days from the date of this notice.

/s/ Denese Thomas
Denese Thomas
Case Officer
Case Processing Division 2/4
202- 778-8872

Exhibit I

LAW OFFICES
BERSCH & RHODES
A Professional Corporation
Suite 640, Colonial Plaza
P. O. Box 1529
Roanoke, Virginia 24007

Robert S. Bersch (703)345-7336
Harry S. Rhodes
Alice D. Burlinson File No. 85116.6

July 15, 1987

Ms. Denese Thomas
Case Officer
Case Processing Division 2/4
Pension Benefit Guaranty Corporation
2020 K Street, NW
Washington, D.C. 20006-1806

Re: Coleman Furniture Corporation
Pension Plan
EIN/PN: 54-0176030-001
Case No.: 07764700

Dear Ms. Thomas:

We represent Mr. Roy V. Creasy, Plan Administrator of the above plan. The plan received a Notice of Sufficiency from PBGC on March 20, 1987, and the distribution deadline was extended sixty (60) days to August 20, 1987.

The participant with the largest interest in the plan is in bankruptcy. The bankruptcy trustee has filed a court proceeding requesting payment of the pension benefits to the bankruptcy trustee, rather than the participant. The Plan Administrator will not be able to distribute the participant's benefits until this issue is resolved by the Court. Therefore, we request an additional extension, which I understand will be ninety (90) days.

To confirm, please sign and return the enclosed copy of this letter, indicating the new deadline in the blank.

Thank you for your assistance. Please give me a call if you have any questions.

Very truly yours,

BERSCH & RHODES, P.C.

Harry S. Rhodes

HSR:bmb
Enclosure

cc: Mr. Roy V. Creasy, Trustee
Ms. Gayle L. Abbott
Mr. Stephen T. McElhaney, F.S.A.

The deadline for the distribution of plan assets to participants is extended until /s/ November 20, 1987.

/s/ Denese L. Thomas 7/20/87
Case Officer CPD 2/4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:	) FILED
ROY V. CREASY, Trustee	)AUG 27 1987
in Bankruptcy for	)Joyce F. Witt,
Coleman Furniture	)Clerk
Corporation	)By /s/ R. Collins
	)Deputy Clerk
	)
	) CIVIL ACTION NO.
	) 86-0272-R
v.	)
	) O R D E R
	)
COLEMAN FURNITURE	)
CORPORATION PENSION PLAN,	)
	)
Defendant	)

This case is before the court on the motion f John R. Patterson, Trustee for Joseph B. Shumate, Jr. to intervene as a party in this suit; upon the objection of Joseph B. Shumate, Jr. to said motion; upon the motion of John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., to withdraw the reference pursuant to 28 U.S.C. § 157(d) a certain adversary proceeding in the United States Bankruptcy

Court for the Western District of Virginia, Number 7-87-0133 and upon the further motion that said adversary proceeding be consolidated into and made a part of this case because there is a common question of law and fact.

Upon consideration of all of said motions and the objections thereto, it is hereby ADJUDGED and ORDERED that John R. Patterson, Trustee, is hereby made a party to this suit with the understanding that the court does not intend the said decision to determine any of the merits of the ownership of the funds belonging to Joseph B. Shumate, Jr. in the Coleman Furniture Corporation Pension Plan now in the custody and control of Roy V. Creasy, Trustee.

It is further ORDERED that any appeals which have heretofore been taken in adversary proceeding 7-87-0133 be filed in this proceeding. All matters involved in

said adversary proceeding shall be stayed until further Order of this court, except as to the matters as contained in this Order.

It further appears to the court that the parties have this day stipulated to certain of the issues and the facts pertaining thereto, it is hereby ADJUDGED and ORDERED that the parties shall be permitted to amend or add to said stipulations and if the parties cannot do so by stipulation, the court will hear evidence of any amendments or additions to the stipulations, and it is further ORDERED that, based upon the said stipulations and briefs which are to be filed by the parties on or before September 21, 1987, the court shall be in a position to have the case submitted to it for decision.

And this cause is continued.

The Clerk is directed to send

certified copies of this Order to the United States Bankruptcy Court for the Western District of Virginia, Roy V. Creasy, Trustee in Bankruptcy, Wilson, Vogel & Creasy, P. O. Box 2420, Roanoke, Virginia, 24010, Harry S. Rhodes, Bersch & Rhodes, P. O. Box 1529, Roanoke, Virginia, 24007, Joseph B. Shumate, Jr., 1217 Memorial Drive, Pulaski, Virginia, 24301, John R. Patterson, Trustee, Dominion Bank Building, Roanoke, Virginia 24011, and G. Steven Agee, Osterhoudt, Ferguson, Natt, Aheron & Agee, 1919 Electric Road, SW, Roanoke, Virginia 24018.

ENTER: This 26th day of August, 1987.

/s/ Glen M. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH B. SHUMATE, JR.,	Clerk's Office :U.S. Dist. Court :AT ABINGDON, VA.
Plaintiff,	: FILED : SEP 15 1987
vs.	: Joyce F. Witt, : Clerk
JOHN R. PATTERSON and G. STEVEN AGEE,	:By /s/ A. Cook : Deputy Clerk
Defendants.	:Civil Action No. : 87-0189-R
ROY V. CREASY, Trustee,	: FILED : Jun 18 1990
Plaintiff,	: U.S. Court : of Appeals
vs.	:Fourth Circuit
COLEMAN FURNITURE CORP. PENSION PLAN,	:Civil Action No. : 86-0272-R
Defendant.	:Abingdon,Virginia : August 26, 1987 1:30 p.m.

TRANSCRIPT OF STIPULATIONS OF FACT
BEFORE THE HONORABLE GLEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

BRIDGET A. DICKERT
Official Court Reporter
U.S. District Court,
Western District of Virginia
P. O. Box 339,
Abingdon, VA 24210
(703) 628-8147

[Transcript, Page 1-A]

APPEARANCES:

JOSEPH B. SHUMATE, JR.
1217 Memorial Drive
Pulaski, Virginia 24301
Pro Se

G. STEVEN AGEE, Esquire
Post Office Box 408
Salem, Virginia 24153
Pro Se

HARRY S. RHODES, Esquire
Post Office Box 1529
Roanoke, Virginia 24007
Counsel for Roy V. Creasy

Proceedings recorded by mechanical stenography, transcript produced by dictation.

[Transcript, Page 2]

(Proceedings commenced at 1:30 p.m.)

MR. AGEE: These are stipulations of fact with appearances by G. Steven Agee,

counsel for John R. Patterson, Trustee; Harry Rhodes, Esquire, counsel for Roy V. Creasy, Trustee; and Mr. Joseph Shumate, pro se.

(Remarks off the record)

MR. AGEE: We are stipulating as follows: first, that this court has jurisdiction to decide the matters in controversy in Civil Action Number 86-0272-R; that the remaining stipulations refer to the numbered answers in the Answer to Motion to Compel Performance filed by Harry Rhodes on behalf of Roy Creasy, and the exhibits therein. The parties agree to and stipulate answers 6, 7, 8 and 9 and do further stipulate that the "Plan" and the "Restatement" are those which are included in the court's file in this case. The parties further stipulate answers 10, 11, 12, 13, 17, 18, 19, 21, 22, 25, 33, 36, 37 and 39. The parties further stipulate that

Joseph B. Shumate, Jr. is fifty-eight years of age; his date of birth is June 6, 1929; and that his marital status is divorced, his divorce having taken effect during the year 1978. That concludes the stipulations.

(Proceedings concluded at 1:35 p.m.)

(Certificate Omitted in Printing)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Roanoke Division)

ROY V. CREASY, Trustee in Bankruptcy for Coleman Furniture Corporation	FILED Dec 4 1987 Joyce F. Witt, Clerk
Plaintiff	By /s/ R. Collins Deputy Clerk
v.	Civil Action No. 86-0272-R
COLEMAN FURNITURE CORPORATION PENSION PLAN	
Defendant	

O R D E R

This matter came to be heard upon the pleadings previously filed and the agreement of the parties as shown by their endorsement of this Order.

1. The Court finds that two issues are before it regarding payment of the benefits of Joseph B. Shumate, Jr., from the Coleman Furniture Corporation Pension Plan. First, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr.,

claims that Shumate's benefits should be paid to him and administered as part of Shumate's bankruptcy estate. Second, Shumate claims that the amount of his benefits is greater than the amount determined by Roy V. Creasy, Trustee and Plan Administrator of the Pension Plan.

2. The Court finds that it is proper for a settlement of the issue regarding the amount of Shumate's benefits to be made which permits the payment of funds in escrow under the supervision of the Court, because this will permit Creasy to proceed with the termination of the Pension Plan without any further involvement with Shumate's benefits.

3. The Court has considered a settlement agreement dated of November 12, 1987, which has been submitted to the Court and finds that the terms of the settlement set forth in this Agreement are

appropriate.

THEREFORE, it is ORDERED that Roy V. Creasy, Trustee, as Plan Administrator of the Coleman Furniture Corporation Pension Plan, is authorized to direct the payment of $250,000.00, representing Shumate's entire interest in the Pension Plan, from the Pension Plan to be deposited with the Clerk's Registry Fund, which fund shall be maintained by the Clerk of this Court in a short-term (no longer than 35 days) Certificates of Deposit as follows:

$100,000.00 at Jefferson Savings & Loan Association, Roanoke, Virginia

$100,000.00 at Virginia First Savings Bank, Roanoke, [sic] Roanoke, Virginia

$50,000.00 at Southwest Virginia Savings & Loan Association, Roanoke, Virginia

Each Certificate of Deposit shall bear the Tax Identification Number of Joseph B. Shumate, Jr., (231-24-6423), and such sum is to be deposited with the Clerk of this Court in the Clerk's Registry Fund until such time as the rights between Shumate and Patterson to this fund are resolved.

It is further ORDERED that the Court ratifies, approves, and incorporates into this order by reference the Agreement between Creasy, Shumate, Patterson and the Plan dated November 12, 1987, and all the terms of the Agreement are to be enforced as part of this order.

It is further ORDERED that Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation, is dismissed as a party defendant in the Adversary Proceeding in the United States Bankruptcy Court for the Western District of Virginia, styled <u>In re: Joseph B. Shumate, Jr., Debtor and</u>

John R. Patterson, Trustee v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.; Case No. 7-84-00549; Adversary Proceeding No. 7-87-0133.

The Clerk of this Court is directed to send certified copies of this Order to the Clerk of the United States Bankruptcy Court for the Western District of Virginia, G. Steven Agee, Esq., James F. Douthat, Esq., Harry S. Rhodes, Esq., and Joseph B. Shumate, Jr.

And this case is continued.

ENTER this 3 day of December, 1987.

/s/ Glen M. Williams
Judge

We request entry of this Order:

/s/ Harry S. Rhodes
Harry S. Rhodes, Esq.
Counsel for Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Plan Administrator for the Coleman Furniture Pension Plan

/s/ Seen and not objected to:

/s/ G. Steven Agee
G. Steven Agee, Esq.
Counsel for John R. Patterson, Trustee

/s/ Seen and not objected to:

/s/ James F. Douthat
James F. Douthat, Esq.
Counsel for NCNB Financial Services

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.

SETTLEMENT AGREEMENT

THIS AGREEMENT, dated November 12, 1987, is between ROY V. CREASY, Trustee in Bankruptcy of Coleman Furniture Corporation and Plan Administrator of the Coleman Furniture Corporation Pension Plan ("Creasy"); JOSEPH B. SHUMATE, JR. ("Shumate"); JOHN R. PATTERSON, Trustee in Bankruptcy for Joseph B. Shumate, Jr. ("Patterson"); and the COLEMAN FURNITURE CORPORATION PENSION PLAN ("Plan").

A. Creasy, the Plan and Patterson are currently involved in a law suit entitled In Re Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation v. Coleman Furniture Corporation Pension Plan; Civil Action No. 86-0272-R in the United States District Court for the Western District of Virginia, ("the Suit").

B. Shumate, Creasy and Patterson are

or have been involved in an adversary proceeding styled John R. Patterson, Trustee, v. Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation and Joseph B. Shumate, Jr.; Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia (the "Adversary Proceeding").

C. In the course of this litigation Shumate has disputed the amount of his benefits from the Plan as determined by Creasy. Shumate has also alleged that Creasy has breached his fiduciary duty to Shumate as Plan Administrator of the Plan. Creasy and Shumate wish to resolve all matters between themselves regarding the amount and method of payment of Shumate's benefits from the Plan and all other claims that Shumate may have against Creasy arising out of Shumate's participation in

the Plan and Creasy's administration of the Plan.

D. Shumate has filed a complaint with the Pension Benefit Guaranty Corporation alleging that Creasy has improperly determined the benefits under the Plan in connection with the termination of the Plan.

E. The parties intend that this agreement will settle all matters between Creasy and Shumate with respect to the Plan, but that this agreement does not resolve the dispute between Patterson and Shumate regarding the proper recipient and the proper method of payment of Shumate's benefits from the Plan.

THEREFORE, in consideration of the following mutual agreements, the parties agree that:

1. Creasy shall direct Signet Trust Company, the Trustee of the Plan, to pay

$250,000.00 in escrow to the Clerk of the United States District Court for the Western District of Virginia to be invested in interest-bearing accounts in federally-insured banks or savings and loan associations provided that no more than $100,000.00 of principal shall be invested in any one institution (unless otherwise agreed by Shumate and Patterson with the court's approval) during the litigation between Shumate and Patterson.

2. Upon payment to the District Court Clerk by Signet Trust Company, Shumate and Patterson shall release and discharge fully and forever Creasy, the Plan, Signet Trust Company, all other fiduciaries of the Plan from any and all claims, demands, and causes of actions which arise from any purported acts, omissions, transactions, obigations, or events connected with the participation of

Shumate in the Plan or referred to in the pleadings of the Suit or the Adversary Proceeding.

3. This Agreement is based on Shumate's benefits determined as if he had elected early retirement benefits beginning July 1, 1984. The amount of the payment from the Plan for the payment of Shumate's benefits pursuant to this Agreement has been determined on the basis of the cost of a single payment annuity providing Shumate with monthly payments of $1,603.23 beginning December 1, 1987, and continuing for his lifetime, plus an amount representing monthly payments in the same amount beginning July 1, 1984, and continuing through November 1, 1987, and accrued interest on these payments at the rate of 7-1/2% per year. The foregoing notwithstanding, the funds paid from the Plan to the Court and the income earned by

this fund shall be the sole source of funds to satisfy the payment of Shumate's benefits from the Plan, and the amount of these benefits shall be determined by the total amount of the fund held in escrow by the Clerk when the litigation between Patterson and Shumate is resolved.

4. The method of payment of Shumate's benefits, whether as a lump-sum, an annuity, installments or some combination of these, shall be determined by the litigation between Shumate and Patterson, or any settlement therein, and shall not involve or affect Creasy in any way.

5. The parties agree that they shall seek to have this settlement approved and included, to the extent necessary or appropriate, in an order of the court. If the court's approval is not obtained, then this settlement agreement shall become void

at the election of any party.

6. Shumate shall notify the Pension Benefit Guaranty Corporation of the resolution of his dispute with Creasy and the Plan. Shumate shall execute whatever documents are necessary to terminate the PBGC administrative proceeding.

7. Shumate acknowledges that Creasy has not warranted the income tax consequences of this settlement in any way, and Shumate is not relying on Creasy as to the income tax consequences of this settlement.

8. The parties agree that any term of this agreement, including the payment of the amount specified in paragraph 1 of this agreement should not be construed as an admission or acknowledgment by any party of the accuracy of any allegation or of any wrongdoing under Federal, state or local law.

9. This agreement constitutes the complete understanding between the parties.

WITNESS the following signatures:

/s/Roy V. Creasy
Roy V. Creasy, Trustee
in Bankruptcy of the
Coleman Furniture
Corporation and Plan
Administrator
date /s/ 11-20-87

/s/Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
date /s/ 11-20-87

/s/ John R. Patterson
John R. Patterson, Trustee
in Bankruptcy for Joseph
B. Shumate, Jr.
date /s/ 12/1/87

COLEMAN FURNITURE
CORPORATION PENSION
PLAN

/s/Roy V. Creasy
by Roy V. Creasy,
Plan Administrator
date /s/ 11/20/87

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

ROY V. CREASY, TRUSTEE,	Clerk's Office U.S. Dist. Court AT ABINGDON, VA. FILED /s/For Roanoke Oct 04 90 Joyce F. Witt, Clerk By /s/ E. Stokes Deputy Clerk
Plaintiff,	
vs.	
COLEMAN FURNITURE CORP. PENSION PLAN, and JOHN R. PATTERSON, TRUSTEE, INTERVENOR,	Civil Action No. 86-272-4
Defendants.	December 16, 1987 1:45 p.m. Abingdon, Virginia

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE GLEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

G. STEVEN AGEE, Esquire
Osterhoudt, Ferguson, Natt,
Aheron & Agee
1919 Electric Road, SW
Roanoke, Virginia 24018

Counsel for Defendant John R.
Patterson, Trustee.

JOSEPH P.[sic] SHUMATE, JR.
1217 Memorial Drive

Pulaski, Virginia 24301
Pro Se.

Proceedings recorded by mechanical stenography, transcript produced by dictation.

BRIDGET A. DICKERT
Official Court Reporter
U.S. District Court,
Western District of Virginia
P. O. Box 339,
Abingdon, VA. 24210
278 ARLINGTON AVE., BRISTOL, VA. 24201
628-8147 (703) 466-5562

[Transcript, Page 2]

THE COURT: Good afternoon, gentlemen. Case of Roy V. Creasy, Trustee in Bankruptcy of Coleman Furniture, Corporation v. Coleman Furniture Corporation Pension Plan Inc., Civil Action Number 86-0272-R. And this case is before the Court this afternoon for evidence to be presented in regard to Mr. Shumate's claim for pension benefits. I entered an order sometime ago, which it was determined that

these funds should be held in trust to be determined whether or not they be payable to John R. Patterson, who is the trustee in Mr. Shumate's personal bankruptcy case, or whether they be paid directly to Mr. Shumate personally. So, I'm ready at this time, gentlemen, if I correctly stated the matter, to hear any evidence you have to present, or anything you have to say about this matter.

MR. AGEE: Your Honor, if it please the Court, there are several items that we weren't able to get on the record at the hearing in August I think the Court will need in order to make its final decision, and it shouldn't take very long to put those on. If Mr. Shumate has any evidence, of course, he can put his in and we can make some comments for the benefit of the Court with respect to this. So, I'll go ahead and proceed.

Judge, when we had made the stipulations on the record at the August hearing, I think all the parties were under the impression that thre was a copy of the Pension Plan with the [Transcript, Page 3] amendments in the Court's file. I think that was probably correct. They may be in another of the many files in these cases, so I have the Pension, the original Pension Plan which was adopted in 1963, and there was a restatement effective December 1, 1976, and a final restatement effective December 1, 1984. I have these here, have those here with certificates from Roy Creasy, the plaintiff administrator, that they are authentic copies, so I'll go ahead and offer those now.

THE COURT: Do you want to mark them as any particular exhibit? If you want to mark anything, say so.

MR. AGEE: I would like to mark the

original as our Number One.

THE COURT: Very well. If there's no objection, the original Pension Plan will be filed as Exhibit One.

MR. AGEE: Judge, we may want to denominate those One, Two, and Three to differentiate between the original and two restatements, if that's okay.

THE COURT: All right. Give the restatement -- do you have a date on them?

MR. AGEE: Yes. The original would be the December 1, 1963 plan, Exhibit Two would be the restatement effective December 1, 1976, and Exhibit Number Three would be the restatement effective December 1, 1984.

THE COURT: Very well. They'll be marked and filed [Transcript, Page 4] as Exhibits One, Two, and Three.

MR. AGEE: The next item, Your Honor, is an affidavit from Roy Creasy, the Trustee in Bankruptcy for Coleman Furniture

Corporation. I believe Mr. Creasy discussed the contents of this with you yesterday.

THE COURT: He didn't discuss any contents; he just told me he was making an affidavit in lieu of coming down here.

MR. AGEE: You're correct, Your Honor. I misstated that. The affidavit states the assets in the Pension Plan, and what the remaining expenditures and estimated expenses to close out the Plan are, and I would offer that, too, as Exhibit Number Four.

THE COURT: Do you have a copy of that, Mr. Shumate?

MR. SHUMATE: Yes. This is not signed, Your Honor, the copy I have, and I would object to it.

THE COURT: Well, as long as it's the same copy, it doesn't matter whether yours is signed or not. See if it's the same

copy.

MR. SHUMATE: I don't have these records, so I can't verify them. I have to use his signature to verify them.

THE COURT: Well, let him see the --

MR. AGEE: None of these are signed. Mr. Creasy gave me these about 11:00 last night. I didn't look at them until we got here, Judge. It's not signed. How about if I [Transcript, Page 5] put this in and let Mr. Shumate object to it, and Mr. Creasy can make another affidavit at another time, if that's okay.

THE COURT: Well, I think that's fine. In other words, I won't be considering this. Whatever value it may be to us today, it will be admitted with the understanding it's not verified.

MR. AGEE: So, I'll offer this as Number Four.

THE COURT: I understood this was just

basically an accounting thing that Mr. Creasy was going to be giving, and I thought he could give it by statement as well as -- if there's some question about it, we could take it up.

MR. AGEE: Mr. Shumate's point is well taken. He didn't sign it. And he offered this in lieu of appearing today, and I think he can, it won't be difficult for him to correct the omission of not having signed the affidavit. I have three remaining exhibits. The first two are certified copies of proofs of claim filed by NCNB in Mr. Shumate's personal bankruptcy case which are certified from the Clerk of the Bankruptcy Court.

THE COURT: You say these are certified by the Clerk?

MR. AGEE: Yes.

THE COURT: They will be marked Exhibit Five. Do you have a copy of that

for Mr. Shumate?

MR. AGEE: No, I don't.

[Transcript, Page 6]

THE COURT: Well, file it and I'll have the Clerk make him a copy. Well, I assume you have a copy of this, don't you?

MR. SHUMATE: I don't have a copy, but I would like to point out to the Court that the IRS claim is disputed, and there is civil action pending on that. Also, on the original claim of NCNB for $8,000,000, it's disputed, and the claim they adjusted and filed in November of this year --

THE COURT: Well, I understand, all this is just a claim.

MR. SHUMATE: What they use to support is the one the trustee signed and, of course, that claim is not, that agreement is not valid with anyone except the trustee.

THE COURT: Well, this one is dated

November 3, 1987 by the Bankruptcy Clerk, and it is a letter from Mr. Douthat, and I assume you got a copy of it.

MR. SHUMATE: No, sir, I did not. I found it in the file, but I didn't get a copy of it. But the agreement is the same agreement that was made between the trustee and NCNB which was agreed upon on October 30, and that agreement was just between the trustee and NCNB, and but did not relate to anyone else.

MR. AGEE: Your Honor, the certified proofs of claim filed as Exhibit Five are filed solely to show that there are pending claims in that case.

[Transcript, Page 7]

THE COURT: Well, hold it just a minute, Mr. Agee. The only thing -- Mr. Shumate, do you have a copy of this so I won't have to bother making another copy right now?

MR. SHUMATE: I do not have a copy of the November 3 --

THE COURT: I don't mean with you. Do you have a copy?

MR. SHUMATE: No, sir.

THE COURT: You mean that NCNB, at the time they delivered this to the Clerk back on November 2, 1987, didn't give you a copy?

MR. SHUMATE: No, sir.

THE COURT: Well, it is exactly the same thing as that contained in my court order dated the 30th of October in which NCNB Financial Services is allowed a \$2,522,259.27 unsecured claim against the estate of Coleman Furniture Corporation, and all in the world this is is an amended, amendment filed by NCNB on November 2, 1987, asserting this also as a lien against you personally.

MR. SHUMATE: Your Honor, as I tried

to point out --

THE COURT: Well, I'm not going into whether you owe this or not right now. All I'm going into is whether it's necessary, I mean, do you know that they're now claiming this two million some dollars that was contained in the settlement agreement between NCNB, against you.

[Transcript, Page 8]

MR. SHUMATE: Yes, sir, I do know that.

THE COURT: Okay. And the other document is that the Internal Revenue's asserting a claim of \$211,867.09 and the County of Pulaski, \$6,605.94.

MR. SHUMATE: I'm well aware of the Internal Revenue claim, sir.

THE COURT: Well, in other words, this is a proof of claim filed in Bankruptcy Court.

MR. SHUMATE: The county claim would

be for taxes, and I believe that would belong to the trustee at the time for the real estate.

THE COURT: All right. I'll have the Clerk to mark the claims of NCNB, the original and the amended claim, to be marked filed as Exhibit Five, and the claim for taxes to be marked as Exhibit Six. All right. Do you have anything else, Mr. Agee?

MR. AGEE: Your Honor, I need to ask Mr. Shumate a few questions in his capacity as a former officer and director, so, if I could call Mr. Shumate.

THE COURT: All right. Swear Mr. Shumate.

JOSEPH B. SHUMATE, DEFENDANTS' WITNESS, SWORN
DIRECT EXAMINATION

BY MR. AGEE:

Q. You are Joseph B. Shumate, Jr.?

A. Yes.

[Transcript, Page 9].

Q. Mr. Shumate, I just direct your attention from 1978 until the time that Coleman Furniture entered the Chapter 11 bankruptcy, during that period of time you were the president of the company and, also, chairman of the board of directors; is that correct?

A. No, sir.

Q. Were you president of the corporation?

A. Not all of that period of time, no.

Q. During what portion of that period were you not the president?

A. I became president in 1979.

Q. And were you president continuously from then until the corporation entered Chapter 11 proceedings?

A. Yes.

Q. And the board of directors was composed of how many members from the time the buyout of stock was finished in 1978 until

the Chapter 11 proceeding?

A. Four directors.

THE COURT: Four directors besides you?

THE WITNESS: Three directors including myself.

THE COURT: Three and you make four?

THE WITNESS: Yes.

BY MR. AGEE (Resuming):

Q. During that period of time, were you also the administrator of the Coleman Furniture Pension Plan?

[Transcript, Page 10]

A. Yes.

Q. During that period, and we'll start in 1978 when the buyout was terminated, is it correct that there were approximately 19,000 shares of stock outstanding?

A. That would be an approximate figure, yes.

Q. And of that number, you owned

approximately 10,835 shares in your own name?

A. That would be an approximate figure.

Q. And there were approximately, excuse me, there were approximately 7,608 shares that were in an irrevocable trust; is that correct?

A. I don't remember the exact number.

Q. Does that sound like it's approximately correct?

A. It would be in the ballpark, yes.

Q. You had the right to vote those shares during that period of time; isn't that correct?

A. I did.

Q. And the trust, are there any copies of that irrevocable trust today?

A. I'm not sure.

Q. Were you the one who established the trust?

A. Yes.

Q. So, at one point in 1978, at least, you would have owned not only the 10,835 shares, but also the 7,608?

A. That trust I did not own in 1978.

[Transcript, Page 11]

Q. How did it get into that trust?

A. The funds were transferred from one trust to another.

Q. Could you tell the Court a little bit about how that transferred, and from what trust they went to what other trust?

A. The funds were in trust for my children, and when I took the company private, my ex-wife insisted that the children be bought out at the same time, and I had to buy out that estate, or that trust, and I took the funds, I took the stock and put it into another trust.

Q. So, would it be correct to say you, yourself, purchased the stock from one trust and then turned around and put it

into another?

A. I transferred it from one to another, that is correct.

Q. Were you under any binding legal obligation to do so?

A. No, sir.

Q. And the irrevocable trust that existed from that point approximately in 1978, have you revoked that trust?

A. I have revoked it.

Q. And is it correct to say that you had the power to revoke and turn the shares into your name at any time during that period?

A. I did.

Q. Did you say yes?

A. Yes.

Q. And one last question. In ordinary corporations, first [Transcript, Page 12] the shareholders would elect the directors, who in turn would elect the officers of the

board of directors. Is that the procedure followed by the corporation?

A. That is the procedure required by law.

MR. AGEE: That is all I have. That is all the evidence I want to put on.

THE COURT: Do you want to remain seated and testify as to anything you want to say, or do you want to testify?

MR. SHUMATE: I'd like to point out from the standpoint of the Plan administrator, the Plan administrator in Mr. Agee's arguments did not have the authority to terminate the Plan. The Plan administrator could only administer the Plan and administer the Plan to the benefit of the corporation as the Plan so directed. I mean he had no right to, to, to terminate the Plan as he just stated. The, I have, I planned on proving this, but I'm on the stand and I'll state, I had the, from the standpoint of the Plan, I've already

discussed in my reply brief that a corporation, that an officer of the corporation can also be a trustee of the Pension Plan or the Plan administrator of a pension plan, and it would not be a conflict of interest. I cited the cases which have just recently been decided in various circuits throughout the country, and there's no conflict as long as you administer the plan to the benefit of the employees.

Now, he is stating that I had the authority to terminate [Transcript, Page 13] the Plan, and that is not correct. The Plan, when the corporation entered into a loan agreement with NCNB, and the loan agreement specifically stated that the, stated that all the collateral the company had was part, was collateral for the loan, and in the covenants, in the loan it so specified that in Article Four that you

could only use any funds, liquidated assets of the company --

MR. AGEE: Are the documents -- I'm going to object. Are the documents in evidence --

MR. SHUMATE: I'll put them in evidence right now. This is a signed copy of the loan document between Coleman Furniture Corporation and NCNB, dated January 4, 1974, seventy-eight. And we had that as Exhibit Number One and we'll look at the loan agreement, on page -- I'd also like to submit this as Exhibit Number Two--

THE COURT: Well, since we didn't have those others, let's have those marked, these two documents as Exhibits Seven and Eight. Now, what is the first one, Exhibit Eight. Now, what is the first one, Exhibit Seven? What is it?

MR. SHUMATE: Exhibit Seven would be a copy of the loan documents between Coleman Furniture Corporation and NCNB,

dated January 4, 1978.

THE COURT: All right. And Exhibit Eight?

MR. SHUMATE: Exhibit Eight would be supplemental evidence for turnover of pension assets to participants.

[Transcript, Page 14]

MR. AGEE: Is this an exhibit or --

MR. SHUMATE: This would be an exhibit.

THE COURT: Well, now, where is that from? From the records of Coleman?

MR. SHUMATE: These are basically, basically is a list of cases which I have, cases which I will reveiw at this time.

THE COURT: Well, we don't need cases. I want evidence right now. You can refer to law later on.

MR. SHUMATE: On Article Three --

THE COURT: What's Exhibit Eight?

MR. SHUMATE: This is Exhibit Seven.

Exhibit Eight has supporting arguments, cases and also, also, excerpts from the loan document.

THE COURT: What I'm getting at is what you handed to the Clerk marked as Exhibit Two, and I'm calling as Exhibit Eight.

MR. SHUMATE: That's supplemental evidence --

MR. AGEE: I don't want that marked as evidence. It's basically a memorandum. It can be submitted as a memorandum, but not as evidence.

MR. SHUMATE: Also, I have excerpts from a loan agreement --

THE COURT: Now, have you already filed this previously?

[Transcript, Page 15]

MR. SHUMATE: This is a supplement to what I previously filed?

THE COURT: Supplement to what you

previously filed?

MR. SHUMATE: Yes.

THE COURT: Do you have a copy of it?

MR. AGEE: Just got it, Judge.

THE COURT: Well, the Court will receive it. It's already marked as Exhibit Eight on it, so I'll just leave it that way. It's not really an exhibit, but it's entitled to be filed as argument.

MR. SHUMATE: In the agreement on page five of the Loan Article Three, it states that the collateral referred to in Section Three should be used for the purpose intended by its purchase in the business of the company.

THE COURT: Now, wait a minute. Where are you reading from?

MR. SHUMATE: This is out of the loan document book and the loan, itself, Article Three, paragraph 3.4.

THE COURT: Article Three, paragraph

what?

MR. SHUMATE: Three point four.

MR. AGEE: Could I have a copy of the pages you are reading from?

MR. SHUMATE: I gave you a copy of this.

MR. AGEE: It's in this thing right here?

MR. SHUMATE: Yes.

[Transcript, Page 16]

MR. AGEE: Okay.

MR. SHUMATE: What I'm pointing out, in signing this agreement, I agreed that no collateral or assets of the company would be sold and liquidated unless it was used in the company or turned over to NCNB. That eliminated any opportunity of me being able to take a dividend as Mr. Agee has inferred. In Article 401, paragraph H on page 15, another covenant --

MR. AGEE: I don't have a copy of

that.

MR. SHUMATE: On page 15, paragraph H, there is a negative covenant that states I cannot declare a dividend for any fiscal year on any more than $50,000, other than dividends payable solely in shares of common stock. However, before any dividend payment, after tax profits must exceed the debt service by $50,000. In 1980 and 1981 and 1982, the tax, the income after taxes did not exceed the debt service by $50,000, and therefore, you can not pay any dividend whatsoever. That is basically the evidence which I have to submit at this time for the arguments that Mr. Agee has submitted in the last couple of months. However, I do have some cases I'd like to refer to which support my position in this matter, that this is a spendthrift trust.

THE COURT: All right. I take it that both sides have concluded their evidence.

MR. AGEE: Yes.

[Transcript, Page 17]

THE COURT: And the principal issue in this case is whether or not this was, would come under a spendthrift trust and thus be excepted from being a part of the estate.

MR. AGEE: Yes. That's basically the issue.

THE COURT: All right. I'll hear you first then, Mr. Shumate, on your argument.

MR SHUMATE: Your Honor, --

THE COURT: Do you have a list of cases you want to present to me?

MR. SHUMATE: The list is in the supplemental evidence which is submitted as --

THE COURT: Everything is in it then? All the cases?

MR. SHUMATE: I have a couple more which I would discuss, also.

THE COURT: Well, if you get to any

that are not in here, tell me.

MR. SHUMATE: All right, sir. I want to point out in 1964 when the Coleman Pension Plan and Trust was established, which was retroactive back to November 1, 1963, the purpose of this was to provide a pension for its employees for their sole use at retirement. And the reason for that was to guarantee these people that they would have an income after they became unable to work, and in doing so, Coleman structured this Plan in the manner of a spendthrift trust so that the [Transcript, Page 18] benefits of the Pension Plan would actually be paid to participants and would not be assigned, alienated from the participants. This was also required at that time to make the Plan cost deductible to the settlor and the Internal Revenue Code. In 1974 when Congress passed the Employee Retirement Income Security Act,

known as ERISA 29 USC Section 101, which mandated spendthrift trust provisions in all of the pension plans in order for a plan to qualify under ERISA, in other words, after 1974 you had to put the spendthrift trust provisions into the Plan to qualify for ERISA. Also, the Internal Revenue Service also bona fide their code under 26 USC Section 401(a)(13) which states that,

> "A trust shall not be considered actually a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

Now, the Internal Revenue Service also enacted that at this time in order for a plan to be qualified, which our Plan is qualified, that it had to have, that it had to have an alienation and assignment clause in it. Now, the Code of Virginia, Section 55.19 enumerates the requirements for a

spendthrift trust, and these requirements are, one, it sets a dollar limit. The dollar limit today is 500,000. The fund must be put in the trust. Both the corpus and income there- [Transcript, Page 19] from can be used to pay benefits to the beneficiaries, and also, the trustee must apply the funds for the support and maintenance of the beneficiaries. That's what he has to do with it. And the funds must not be subject to the beneficiaries' liabilities or alienation. And, no trust shall operate to the prejudice of any existing creditor of the creator of the trust. In other words, if the settlor wanted to take these funds and take them away from one of his creditors and create the trust, that would not be a spendthrift trust. But this trust was established in 1964 retroactive to November 1, 1963. The trust was not established to prejudice any

existing creditor at that time. No creditor came forth. And the Coleman Pension Plan complies with Section 55.19, Spendthrift Trusts, of the State of Virginia. The provisions are in there and I believe this Court approved it in February 19, in February of this year, and it was an approved Plan, approved by ERISA, as well as the Internal Revenue Service, in order for the Plan to be modified or closed out.

Also, I'd like to point out Virginia courts, as well as federal courts have ruled consistently that this statute is protective remedial and not restrictive and should be construed liberally. Landmark cases supporting this interpretation are Sheridan v. Krause which was in 1934, and I'm not going to give you the cites, it's a Virginia case, and then Alderman v. Virginia Trust Company, 1943. This was a

case [Transcript, Page 20] where the president of the University of Virginia established a spendthrift trust for his wife and son, and it was adjudicated because his son violated the trust and tried to assign his trust to other people. It was a very interesting case. He was the past president of the University of Virginia. And this case was heard, was decided in 1943. Also, Roundtree v. Lane, which is a Fourth Circuit case. Also, Allen v. Wilson. This was decided in the Bankruptcy Court for the Western District of Virginia in 1980, upholding the pension is a spendthrift trust. 11 USC Section 541(c)(2) states that,

> "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

And probably the principal case in

that is McLean v. Central States, which was settled by the Fourth Circuit in 1984 (sic), which we have both cited in our briefs, and the Court ruled that because of the pensioners' interest, the trust fund was in the hands of the fund trustee and it was subject to enforcement restrictions. The Court also ruled that the anti-assignment provision of the trust agreement would be enforceable, recognizing enforceability of spendthrift trusts, protection of which may run to both income and corpus. The Virginia spendthrift trust statute is basically the same as the Illinois statute, and the reason they have the [Transcript, Page 21] Illinois statute in here is the fact that the pension trust fund was headquartered in Illinois.

And then another interesting case is Smith v. Mirman, 1984, and this court ruled further -- this was the Fourth Circuit --

ruled that employees who accrued benefits under qualified ERISA may not be reached by judicial process in aid of a third party creditor. The court went further to state on page 182 that,

> "A trust will not constitute a qualified trust unde this section unless the plan, of which said trust is a part, provided that benefits provided under the plan may not be assigned or alienated."

This was also a very interesting case because that was pertaining to a case which was being terminated and then ruled that even though the case was being terminated, it was still a spendthrift trust.

In a 1986 case, the court held that despite the fact that the debtor was a self-employed professional, the pension plan and trust were enforceable against general creditors, and thus, were excluded from the bankruptcy estate. Now, this was a self-employed professional.

In a 1985 case, the court held that spendthrift provisions of a trust were enforceable under Nebraska law. Now, Nebraska law is very similar to Virginia law. Another case, In Re: Crenshaw, 1985, the court ruled that the pension plan
[Transcript, Page 22]
qualified as a spendthrift trust under Illinois law, therefore, the pension plan was excludable from the debtor's estate. In another 1985 case, the court ruled that the trustee had no interest in pension funds. In Re: Matson, a 1986 case, the Bankruptcy Court in Colorado, the court held that the debtors' interest in the plan was not the property of the state where the plan qualified as a spendthrift trust under Colorado law.

Of course, we've already addressed the last issue. This is the issue on the standpoint of control. As I pointed out to

you before, I did not have control to, if I did, if I, as principal stockholder of the company, had elected to terminate the Pension Plan, I would not have profited from the same whatsoever. The Pension Plan was such that if I had terminated the Plan, I would have had to use those funds, surplus funds or the funds that would have been returned to the corporation in the business or turned them over to the creditor. Those are just the predominant cases that a spendthrift trust as specified by state law and spelled out in 541(c)(2) is just, there's cases after cases after cases, it's exempt from the estate. Thank you.

THE COURT: All right, Mr. Agee?

MR. AGEE: Your Honor, if it please the Court, previously I filed a brief dated September 21, which I believe is in the Court's file, and subsequent to that a

letter dated October 5 to Your Honor, which served as a supplement to the [Transcript, Page 23] brief after Mr. Shumate had filed a reply brief. Now, I'll briefly recap the argument, particularly with respect to the decisions of the Circuit Courts of Appeal.

The first issue that the Court would have to face in this matter is whether or not the Pension Plan assets are property of Mr. Shumate's bankdrupty estate. I don't think there's any argument about that. All of the Circuit Court of Appeals' cases are clear. The Pension Plan entitlements are property of the debtor's estate.

THE COURT: Before you go any further, what date did you say that letter was you wrote me?

MR. AGEE: October 5. I may have sent that to you directly, Judge, and not have filed it in the Clerk's Office, so it might not have been in the file.

THE COURT: All right. I have it.

MR. AGEE: Having determined that Plan assets of the debtor are property of the bankruptcy estate, then the Court has to determine is there an exclusion under the Bankruptcy Code to exclude it from, from the estate, or is there a possible exemption, and the exclusion language which has already been referred to is in 11 USC Section 541(c)(2), and without going into a lot of detail, that says that there is a restriction on the transfer of interest that's enforceable under applicable nonbankruptcy law, then that will act to exclude the particular asset from property of the estate. And [Transcript, Page 24] that key language is applicable nonbankruptcy law because that's what Circuit Courts of Appeal have focused on in deciding this particular issue, and the cases that have dealt with that.

Is the, is the qualified Plan interest of the debtor excluded under the applicable nonbankruptcy law of the state in which the debtor resides? The first case that dealt with that was in the Fifth Circuit, In Re: Goff, (phonetic). The Goff court went into great detail on the legislative history of that phrase from Section 541(c)(2), and it found in a House report, which was the report used with the Bankruptcy Reform Act of 1978, this is on page nine of my brief, that the Section 541(c)(2) restriction continues the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law. The Goff court then concluded that the reference to applicable nonbankruptcy law is to exempt only those spendthrift trusts traditionally beyond the reach of creditors under state law. The

other circuit court of appeals cases, the Ninth Circuit In Re: Daniel, the Eighth Circuit In Re: Graham (phonetic), and the Fourth Circuit in the McLean case have all agreed with that. It does not create an ERISA exemption for the pension plan assets in the debtor's bankruptcy estate. There has to be an exclusion that's claimed under the applicable state law. I [Transcript, Page 25] don't think there's any question that in this case the applicable state law is Virginia law. The employer establishing the plan was a Virginia corporation, the site of the trust is in Virginia, the debtor is in Virginia, so we look to try to find in Virginia law what does it say about a spendthrift trust in this particular situation?

Judge Shelley of the Bankruptcy Court in the Eastern District rendered a decision

<u>In Re: O'Brien</u> in 1985. In that case there was a physician, Dr. O'Brien, who established a Keogh plan. So, Dr. O'Brien was the settlor of the plan, was also the beneficiary. And under a very lengthy spendthrift analysis, Judge Shelley does about as good a job of any law review article of tracing Virginia Spendthrift law, and I would remember that case to the Court because I think it's got about every citation on Virginia spendthrift trust law that you could hope for. Judge Shelley's opinion was the bankruptcy trustee of Dr. O'Brien could reach the asset and it was not an excludable asset from her estate, and the reason was the irrevocable nature of the Keogh plan. It was that Dr. O'Brien could revoke the plan at any time, but because of that power of revocation, she would not be allowed to place her assets beyond the reach of her creditors because

of the protection of the spendthrift provisions in her plan. And a Keogh plan is very similar to a pension plan that's established by corporate sponsor, has the same spendthrift trust protections.

[Transcript, Page 26]

Then the 11th Circuit decided a case called <u>Lichstrall</u> (phonetic). Dr. Lichstrall was the beneficiary of a corporation pension plan, and Dr. Lichstrall went into bankruptcy, and the 11th Circuit said we're not going to allow Dr. Lichstrall to say that this is an excludable asset because he, too, had the power to revoke the plan by virtue of his control of the corporate sponsor, and that's what brings, through Judge Shelley's analysis in the <u>O'Brien</u> case, and the Circuit Court of Appeals' decision in <u>Lichstrall</u>, the Court to where it can examine Mr. Shumate's situation in the

Coleman case.

Now, the argument on behalf of Mr. Patterson, Mr. Shumate's trustee, could only be made against Mr. Shumate and no other participant in the Coleman plan. There are about 400 participants, but by no one except Mr. Shumate could this argument be made and that's because of a key element of control and the irrevocable nature of the Pension Plan that makes this argument feasible, and I think brings it in line with the Court of Appeals' decision in Lichstrall and the other cases that are cited in the brief, and that's this. The, at any time from 1978 on, because of the voting control that Mr. Shumate had over Coleman Furniture Corporation, he could have caused, under Section 9.2 of the Plan, the Plan to terminate. There was no restriction on him. He had the legal authority to do that. And once the Plan

was terminated, approximately 19 percent of the assets of the Plan, as we view them today, [Transcript, Page 27] would have passed directly to Mr. Shumate. The Plan, the total Plan assets amounted to about a million four. After expenses there were net assets to distribute of about $1,350,000, $200,000 already pakd into the Court pending decision in this case. There's a reversion back to Coleman Furniture of approximately $516,000 and approximately $569,000 have already been paid out to participants, and those are all outlined in the affidavit. So, the funds that have then returned back to Coleman Furniture Corporation, either paid out as a dividend or applied to the debts of Coleman Furniture Corporation, for which there is at least an alleged liability on Mr. Shumate's part. Once again, his voting control of the company gave him the ability

to take the reversion, 96 percent of that $516,000, and have it applied directly or indirectly for his benefit. It's not important that he never did that, or the circumstances that arose, but he had the power to do that because that's what's important, and whether or not the spendthrift provisions of the Pension Plan are to be observed in his case, the power was there with which the Plan could have been revoked at any time, and once the Plan was revoked, Mr. Shumate would have stood to benefit to the tune of about 55 percent of the total assets of the Plan, either directly or indirectly, upon the Plan's dissolution. And it's that power that makes the spendthrift provisions of the trust inapplicable to Mr. Shumate in this case, and so, under the phrase

[Transcript, Page 28]

nonapplicable bankruptcy law, there is not

an exclusion for Mr. Shumate's pension benefits because of his power and control over that.

There are some other arguments that have been made in the brief with respect to whether if the property is not excluded from his estate, could it be possibly be exempt, and I don't think there are any merits to those particular arguments. The only bankruptcy exemptions that are available in Virginia are those provided by the Virginia statute which would be under the Homestead deed. There was no claim on the petition, there was no Homestead deed filed, so there are no bankruptcy additions available for the benefits. That's the sum and substance of the trustee's argument in this case, Your Honor.

THE COURT: All right.

MR. SHUMATE: Your Honor, if it please the Court, I'd like to dispute Mr. O'Brien,

Mr. Agee's statement on the case of O'Brien. Mr. Agee said that Dr. O'Brien, who was Mrs. O'Brien, was the settlor of the trust. That is not correct. If you would read the O'Brien case, there were two people, two doctors, her husband was a doctor and she was a doctor. The settlor in the case was Dr. John P. O'Brien. Judge Shelley ruled to the contrary, even though John O'Brien was settlor. I want to point out to the, to you in this case, it's not the same. On page 75 it states Dr. John P. O'Brien is settlor of the trust having made all contributions to the Keogh plan. [Transcript, Page 29] Now, this was a, this was certainly not the case. This was a one person Keogh self-employed retirement plan. This was not a trusted arm's length retirement plan which was funded, the settlor was a separate entity, a corporation known as Coleman Furniture.

The O'Brien case is certainly not a comparable case to use, and also the McLean case which is a Fourth Circuit case contradicts this, just, is just not a comparison. I think we have to look at the Fourth Circuit ruling before we go to the Eastern District of Virginia bankruptcy courts. There's just no comparison there. It's not the same.

Now, on the case of Lichstrall, he practiced medicine, he was a single employee, had no other employees, and he also had the right to do whatever he wanted to. He could borrow from it, he could borrow from the plan, he could buy a house with it, anything he wanted to. So, the court ruled that the, that although the two pension plans contained anti-alienation provisions, they were not spendthrift trusts under Florida law as the beneficiary could amend and terminate the plan in his

capacity as agent of the settlor. Again, I am not the agent, I was not the agent of the settlor in the Coleman case. He was the agent. He was the owner. I wasn't the owner of the Plan. It was a separate entity and I think that Lichstrall is not applicable to this case at all. I think if you want to look at applicable cases, you should look at the Bankruptcy Court in the Western District of Virginia, Allen v. Wilson [Transcript, Page 30] settled by Judge Pearson, also McLean, Mirman, both Fourth Circuit Courts, Roundtree v. Lane, Fourth Circuit. These would be, in my opinion, would be more applicable than these cases. Also, I'd like to point out that the cases he mentioned, Graham, Goff, Lichstrall, the Fourth Circuit said that they thought that those cases were not correct. They thought they were flawed. That's the exact word the court used.

Now, from the standpoint of control, there are thousands of pension plans throughout the country which are administered by officers of the company. And there have been various rulings of the court which I have presented to you in brief that as long as you rule in favor of the employees, there is no conflict whatsoever, and I think you'll find that I, in the 20 some years I was the Plan administrator, I always ruled in favor of the employees. In fact, I argued against amendment of the last plan because I did not believe it was to the benefit of the employees, which you well remember. But in these cases which he's talking about, the Fourth Circuit has overruled these cases, not overturned, but they have ruled in different ways.

Also, I originally submitted to you some Supreme Court cases on ERISA. This

particular situation has not been addressed by the Supreme Court to my knowledge, but the Supreme Court in their rulings indicate that they feel, in the cases in which I submitted to you in my first draft, my first [Transcript, Page 31] brief, that the ERISA, that the retirement plan benefits are exclusively for the participants, and was not to go to anyone else. That was labor law, and actually from the standpoint of the bankruptcy law, the Supreme Court has never ruled to my knowledge.

I wish to point out to you, look at the Fourth Circuit rulings and the rulings in the Western District which support my position. Also, that the Coleman Pension Plan qualifies as a spendthrift trust under Virginia law.

THE COURT: Let me ask you one thing. There's no major contention, as I understand it, on the matter of control,

and they're saying that certainly there's no greater power that a person could have than to just dissolve it, end it, terminate it, and that you had, you've shown by your evidence here today complete power at any moment of time beginning in 1978 under Article 9.2, The Power to Terminate. Do you dispute that?

MR. SHUMATE: I did not have the power to terminate the Plan for my benefit, which they have argued.

THE COURT: Did you have the power to terminate it period, voting power to terminate it?

MR. SHUMATE: I had the voting power to select directors, yes.

THE COURT: And the directors have the power to terminate?

[Transcript, Page 32]

MR. SHUMATE: That is correct. However, if the directors had terminated

the Plan, no stockholder would have gotten any benefit out of the termination of the Plan.

THE COURT: Why not?

MR. SHUMATE: Because as I pointed out to you, after 1978, under our term loan agreement, that any liquidation had to go to the creditor of the company or go back into the operation of the business, and that no dividend could be paid from the company to the stockholders, which I pointed out to you in the loan document which has been submitted as evidence today. They say I can do this for my benefit. I couldn't do this for my benefit whatsoever.

THE COURT: All right. I wanted to get their original premise out of the way, and so if you disputed that, so you say that's true, but that even with that being true, there's no way you could have taken

this to your benefit because of the loan agreement?

MR. SHUMATE: That is correct. Also, after November 4, November 3, 1982, I could not terminate the Plan without the approval of the Bankruptcy Court. After February 18, 1983 I did not have the authority to even recommend terminating the Plan, as then it was under the hands of the trustee.

THE COURT: I understand.

MR. SHUMATE: This Plan was never terminated and no [Transcript, Page 33] effort was ever made to terminate the Plan prior to the time the trustee came on board. And I would have certainly been in violation of my fiduciary responsibilities if I had attempted to terminate the Plan prior to that for my benefit, as I could not terminate the Plan, and not be prejudiced towards, or detrimental to the participants in the Plan. And the way the

Plan was terminated was detrimental to the participants. That's how the surplus came about, is because the participants were penalized, and this was the argument I made right there. If we terminated the Plan according to the way the trustee questioned, then the participants would be penalized. But when I had control of the Plan, there was only a $50,000 surplus in the Plan. That was in 1982. After the Plan was terminated an individual's seniority was wiped out. That's when the surplus occurred. And I argued against that all the way, as you remember.

THE COURT: Yes.

MR. SHUMATE: In my reply brief, which was filed on September 28, I brought to the attention of the Court a case in the 11th Circuit which was decided this year, Beaks v. Masters, Mates & Pilots (phonetic), and it states that a fiduciary

can act on behalf of both parties until a situation arises which requires action in the interest of the party other than a conflict with the interest of the plan beneficiaries. The report goes on to state that the statutory [Transcript, Page 34] imposed fiduciary duty to act solely in the interests of participants and beneficiaries under ERISA require trustees who are also officers and agents of the corporation to act with caution in areas of potential conflict in interest. I have acted with caution, and I have taken at all times, when I was in control or Plan administrator, or had the right to terminate the Plan, I operated the Plan in the interest of the participants and no one can say that I have violated my fiduciary duties, and as long as I did not violate my fiduciary duties, I could not terminate the Plan for my benefit. The position is also

supported by the Second Circuit which ruled in 1982 in Donovan that officers of the corporation who are trustees of the pension plan did not violate their duties as trustees. As long as I acted as a fiduciary and for the benefit of the beneficiaries, I could not terminate the Plan. That's the situation. These are circuit court decisions to support that position. But I have done nothing wrong and even through I was an officer of the company and had the right to do it, I didn't do it. I, if I had gone and done it, then they would have an argument, but I didn't. The Plan was administered for the benefit of the participants the whole time right on up until I lost control, and I also pushed for the benefit of the participants up until your ruling of February, 1987.

THE COURT: All right.

[Transcript, Page 35]

MR. AGEE: Your Honor, if I could just make a few concluding remarks.

THE COURT: All right.

MR. AGEE: With respect to the McLean case, I think that the brief that I've offered the Court does come in all the Circuit Court of Appeals' cases unless they've come out last week, deal with this particular issue, all of the Circuit Courts of Appeal, and I think there are four of them, the Fifth, Eleventh, Ninth, and Eighth were very clear in allowing the trustee to get to the pension plan asset. The McLean case is very distinguishable as a Fourth Circuit Court case. It did not interpret Virginia law; it interpreted Illinois law. McLean was similarly situated to all the participants in the Coleman Plan except Mr. Shumate, because no other participant in the Coleman plan had

any control of the Plan, and none of them had a remote percentage of interest similar to what Mr. Shumate has. So, the argument that the trustee makes here is totally different than the situation that existed in the McLean case because Mr. McLean was just a truck driver of many thousands of truck drivers in the Teamster's pension fund, which was the fund in issue in that particular case.

Today is the first day that Mr. Shumate has offered up any evidence or ever mentioned a loan document which was offered in evidence today. Whether or not there was a legal agreement between Coleman Furniture and a lending institution [Transcript, Page 36] with respect to any particular actions of the corporation, it doesn't change the fact of the power that existed to terminate the Pension Plan at will, whether or not that might have

violated an agreement of any funds that came out of the Plan that were owed, that were corporate assets I don't think is relevant here. The loan would have been paid off one of these days. Perhaps other assets of the corporation would have been used to pay the loan.

The fiduciary duty argument is one that's placed here. There's no contention that there was a violation of the fiduciary duty. It's solely an argument of who had control and what would have happened if that power had been used. There's not necessity or argument that anything wrong was done. That's just placed in this context. The fact that there was a Chapter 11 filed by Coleman Furniture, and subsequently a bankruptcy filed by Mr. Shumate, doesn't make any difference either because as all the circuit court cases have said, you interpret the phrase in

541(c)(2), applicable nonbankruptcy law to mean the law of that state. Obviously, the Bankruptcy Code is going to have precedence over what state law says, so to read any reasonable meaning into what legislative history says, and what Circuit Court of Appeals say, you have to look at the state law and whether or not the spendthrift law of that state is going to permit a particular debtor to place assets, have control of assets that are in a pension plan and [Transcript, Page 37] exclude those from his creditors. That's all I have, Your Honor.

THE COURT: Okay, are you through, Mr. Shumate?

MR. SHUMATE: I'd like to point out when the Plan was terminated, my position in the plan was the same as McLean's in the trucking plan. I was a participant. I had no control whatsoever over the Plan and I

did not have control over the Plan for years before it was terminated. And I believe that I'd have to be held in the same position as McLean as I was a participant in the Plan, and I had no control over it whatsoever. I had become a participant in the Plan, invested in the Plan by my, by my lengthy service in the company. I'd also like to point out I submitted to you some cases which McLean has since ruled that ERISA, if you were an individual --

THE COURT: Well, I may not have that citation in that McLean case. Would you give it to me?

MR. SHUMATE: Yes. It's in my, on page 3, 762 F.2 1204, Fourth Circuit 1984.

THE COURT: All right.

MR. SHUMATE: That would be -- I gave citations to all these cases which I mentioned in this, in my -- and all the

cases which I've --

THE COURT: The McLean case, isn't, is discussed in the original brief filed by the trustee?

[Transcript, Page 38]

MR. AGEE: Yes, I discussed it.

MR. SHUMATE: But I disagree with his interpretation of the McLean case.

THE COURT: All right. I understand. Okay. All right. We'll adjourn court.

(Certificate Omitted in Printing)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY V. CREASY, TRUSTEE IN BANKRUPTCY FOR COLEMAN FURNITURE CORPORATION	) **FILED**)**AUG 15 88**)**Joyce F. Witt,**) **Clerk**)**By /s/ R. Collins**
Plaintiff	) **Deputy Clerk**)
	)**CIVIL ACTION NO.**
v.	) **86-0272-R**)
	)**MOTION FOR AN**)**ORDER OF**
COLEMAN FURNITURE CORPORATION	)**DISBURSEMENT AND**)**FINAL ORDER**)
Defendant	)

COMES NOW, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr. (hereinafter "Patterson") and moves the Court for a Final Order in this cause and in support thereof represents unto the Court as follows:

1. That a Motion to Compel payment of Joseph B. Shumate, Jr.'s, (hereinafter "Shumate") interest in the Coleman Furniture Corporation Pension Plan

(hereinafter the "CFC Plan") to Shumate individually was filed July 27, 1987.

2. That by Order dated August 24, 1987, Patterson was permitted to intervene in this Civil Action and assert a claim as Shumate's Trustee to Shumate's interest in the CFC Plan.

3. That Patterson, Shumate and Roy V. Creasy, Plan Administrator of the CFC Plan (hereinafter "Creasy as Plan Administrator") and Roy V. Creasy as Trustee in bankruptcy for CFC (hereinafter "Creasy as Trustee") entered into an Agreement dated November 12, 1987, settling all issues between the parties concerning the amount at issue (among other things) except the question of whether Shumate or Patterson was entitled to such funds.

4. That this Court entered an Order dated December 4, 1987, incorporating the November 12, 1987, agreement by reference

and approving its terms; which Order also directed the settlement amount of $250,000.00 to be deposited with the Clerk's Registry Fund pending further Order of this Court.

5. That the Clerk of this Court is holding said funds pending direction by the Court for disbursement.

6. That, after trial on the merits, the Court did enter an Order (with Memorandum Opinion attached) dated February 29, 1988, denying Shumate's Motion to Compel and finding Shumate's interest in the CFC plan was non-exempt, non-excludable property of Shumate's bankruptcy estate and payable to Patterson as Trustee.

7. That Shumate filed a Motion to Reconsider the Court's February 29, 1988, Order.

8. That the Court granted that Motion, but held by Order of April 13, 1988

(with Memorandum Opinion attached) that there was no basis to alter the Order dated February 29, 1988, and affirmed that Order including a reference to 28 U.S.C.§1292(b).

9. That Shumate filed a Petition for Permission to Appeal the April 13, 1988, Order with the United States Court of Appeals for the Fourth Circuit.

10. That the Petition was denied by Order of the Fourth Circuit Court of Appeals dated May 31, 1988.

11. That Shumate then filed a Petition for Rehearing with the United States Court of Appeals for the Fourth Circuit.

12. That the Petition for Rehearing was denied by Order of the United States Court of Appeals for the Fourth Circuit dated June 23, 1988.

13. That Shumate then filed a Motion for a New Trial with this Court dated June

29, 1988, to which an Answer was filed, but no formal Order has been entered by the Court disposing of it.

14. That Adversary Proceeding #7-87-0133 was filed by Patterson in the United States Bankruptcy Court for the Western District of Virginia for turnover of Shumate's interest in the CFC Plan by Creasy as Plan Administrator prior to Shumate's Motion to Compel.

15. That Patterson requested this Court to withdraw the reference to Adversary Proceeding #7-87-0133 pursuant to 28 U.S.C.§157(d) by Motion dated August 12, 1987, and consolidate it with this civil action as the questions of law and fact were identical.

16. That by Order of United States Bankruptcy Judge Ross W. Krumm dated January 8, 1988, all action in Adversary Proceeding 7-87-0133 is stayed until

further order of this Court.

17. That all issues involving Shumate's interest in the CVC plan have been adjudicated by this Court so that Shumate and Patterson should be dismissed as parties hereto.

18. That Patterson, as Trustee on behalf of the Shumate bankruptcy estate, is entitled to payment of the funds on deposit with the Clerk's Registry Fund pursuant to the Court's finding in its Order dated February 13, 1988.

19. That Shumate, Patterson, Creasy as Plan Administrator, and Creasy as Trustee desire that the issue decided by the Court's Orders of February 29, 1988, and April 13, 1988, be resolved with finality by the appropriate Appellate Court at the earliest possible date.

THEREFORE

Patterson moves the Court to enter a

FINAL ORDER encompassing the following:

I. Directing the Clerk of this Court to pay over to Patterson the funds held in the Clerk's Registry Fund representing Shumate's CFC Plan interest.

II. Withdrawing the Reference to Adversary Proceeding 7-87-0133, and consolidating the same with this Civil Action.

III. Dismissing Shumate and Patterson as parties to this civil action.

IV. Establishing the Order as Final regarding Shumate's interest in the CFC Plan and Final regarding any claims between Shumate and Patterson against Creasy as CFC Plan Administrator and CFC Trustee insofar as Shumate's in interest in the CFC Plan is concerned.

V. Dismissing Shumate's Motion for a New Trial.

RESPECTFULLY SUBMITTED,

JOHN R. PATTERSON, TRUSTEE
By /s/ G. Steven Agee
G. Steven Agee
of Counsel

G. Steven Agee, Esquire
Osterhoudt, Ferguson, Natt,
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(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY V. CREASY, TRUSTEE IN BANKRUPTCY FOR COLEMAN FURNITURE CORPORATION	) Clerk's Office)U.S. Dist. Court)At Roanoke, VA) FILED)SEPT 02 88
Plaintiff	)Joyce F. Witt,) Clerk
vs.	)By /s/R. Collins) Deputy Clerk)
	)CIVIL ACTION NO.) 86-0270-R)
COLEMAN FURNITURE CORPORATION	)FINAL ORDER)COB #125, p. 127)
Defendant	)

THIS DAY came the parties, John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr., by counsel, Roy V. Creasy as Plan Administrator of the Coleman Furniture Corporation Pension Plan and as Trustee in Bankruptcy for Coleman Furniture Corporation, by counsel, and Joseph B. Shumate, Jr., pro se, pursuant to a motion

filed by John R. Patterson for an Order of Disbursement and Final Order.

Upon consideration of the Motion, the arguments of counsel and for good cause shown, the Court finds that:

1. All matters involving Shumate's interest in the Coleman Furniture Corporation Pension Plan have been adjudicated by this Court in its orders of December 4, 1987, February 29, 1988, and April 13, 1988.

2. That Shumate and Patterson have no other interest in this matter and that those Orders are final with regard to them and with regard to any other claim regarding Shumate's interest in the Coleman Furniture Corporation Pension Plan, as regards Roy Creasy as Plan Administrator and as Trustee in bankruptcy of Coleman Furniture Corporation.

3. That Adversary Proceeding No. 7-

87-0133 in the United States Bankruptcy Court for the Western District of Virginia, covers identical questions of law and fact as determined by the Court's Orders in this matter and that it is appropriate to withdraw the reference to said Adversary Proceeding and consolidate it with this civil action.

4. That all events have occurred which now entitle Patterson as Trustee of Shumate's bankruptcy estate to be paid the funds held in the Court's registry fund representing Shumate's interest in the Coleman Furniture Corporation Pension Plan.

Therefore, it is hereby

ORDERED

1. That the Clerk of this Court pay over from the Court's registry fund those funds with accrued interest deposited therewith pursuant to this Court's Order of December 4, 1987, and representing the

proceeds of Shumate's interest in the Coleman Furniture Corporation Pension Plan in the initial principal amount of $250,000.00 plus interest accrued thereon;

2. It is further ORDERED that the reference to Adversary Proceeding No. 7-87-0133 in the United States Bankruptcy Court for the Western District of Virginia is hereby withdrawn pursuant to 28 USC § 157 and such Adversary Proceeding consolidated into this Civil Action;

3. And it is further ORDERED that Shumate and Patterson are hereby dismissed as parties to this Civil Action.

4. And it is further ORDERED that Shumate's Motion for a New Trial be hereby dismissed with prejudice;

5. AND IT IS ALSO ORDERED that this ORDER is FINAL regarding Shumate's interest in the Coleman Furniture Corporation Pension Plan and regarding any and all

claims by Shumate and/or Patterson against Creasy as Coleman Furniture Corporation Plan Administrator and Coleman Furniture Corporation Trustee in Bankruptcy insofar as such claims would relate to Shumate's interest in the Coleman Furniture Corporation Pension Plan.

The Clerk of this Court shall send certified copies of this Order to counsel of record, the Clerk of the United States Bankruptcy Court for the Western District of Virginia, John R. Patterson, Trustee, Roy V. Creasy, Plan Administrator and Trustee, and to Joseph B. Shumate, Jr.

ENTER THIS 1 DAY OF September, 1988.

/s/ Glen M. Williams
JUDGE

SEEN AND AGREED TO:

John R. Patterson, Trustee

By /s/ G. Steven Agee
G. Steven Agee
Of Counsel

Roy V. Creasy, Plan Administrator
and Trustee in Bankruptcy

BY /s/ Harry S. Rhodes
Harry Rhodes
Of Counsel

SEEN AND OBJECTED TO:

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr., pro se

p15.ag3.p

Docketed as: SHUMATE'S EXHIBIT from 9-1-88 hearing

September 8, 1988

Ms. Joyce F. Witt, Clerk
United States District Court
for the Western District of Virginia
210 Franklin Road, SW
Room 273, Poff Federal Building
Roanoke, Virginia 24011

RE: Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture Corporation, Plaintiff vs. Coleman Furniture Corporation, Defendant
Civil Action Number: 86-0272-R

Dear Ms. Witt:

Attached please find Shumate Exhibit 1, which was presented in a hearing before Judge Williams in Abingdon, Virginia on September 1, 1988, of which Judge Williams has directed that this Exhibit be placed in the record.

Thanking you for processing this, I am

Yours very truly,

/s/ Joseph B. Shumate, Jr.
Joseph B. Shumate, Jr.
PO Box 2092
Pulaski, Virginia 24301

(703 980-5030

Encls.

AFFIDAVIT

This day personally appeared before me, Roland B. [(sic) /s/D. /s/ RDG] Gunn, who after being duly sworn, said:

1. I am a resident of Locust Street, Dublin, Virginia.

2. I was employed by Coleman Furniture Corporation of Pulaski, Virginia in administration from 1946 until my retirement in June of 1982.

My Title at retirement was Vice President of Administration and Corporate Secretary.

3. I was an active member of the Coleman Furniture Corporation Pension Plan Committee from 1964 until July of 1983 and participated during this period in the administration of the Coleman Pension Plan.

4. Joseph B. Shumate, Jr. elected to retire from Coleman Furniture after Bert Eley, a court-appointed Trustee, terminated

Shumate in February of 1983.

5. I prepared the papers for Shumate's retirement, effective March 1, 1983 and directed Wachovia Bank and Trust Company, a co-Trustee of the Coleman Pension Plan, to start making monthly pension payments to Shumate, beginning March 1, 1983.

/s/ Roland D. Gunn
Roland B. Gunn
/s/ D. /s/ RDG

State of Virginia

CITY/COUNTY OF Pulaski, to-wit:

Subscribed and sworn to before me by ROLAND B. [(sic) /s/ D. /s/ RDG] GUNN this 23rd day of August, 1988.

My Commission Expires: July 1, 1989

/s/ Beverly Ann Terry
NOTARY PUBLIC

Clerk's Office
U. S. Dist. Court
At Roanoke
FILED
SEP 08 88
Joyce F. Witt, Clerk
By /s/ S. Ayers
Deputy Clerk

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ROY V. CREASY, TRUSTEE IN BANKRUPTCY
FOR COLEMAN FURNITURE CORPORATION,

Plaintiff

vs. CIVIL ACTION NO. 86-0272-R

COLEMAN FURNITURE CORPORATION,

Defendant

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Joseph B. Shumate, Jr., Appellant, in the above captioned appeal from the District Court, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Final Order entered in this matter on September 2, 1988.

/s/ Joseph B. Shumate

JOSEPH B. SHUMATE, JR.
PO Box 2092
Pulaski, Virginia 24301
(703) 980-5030

C E R T I F I C A T E

This is to certify that the attached copy of the Coleman Furniture Corporation Pension Plan as amended and restated December 1, 1976, and including all amendments through the eighth amendment, dated May 13, 1980, is a true and complete copy of the original document.

/S/ Roy V. Creasy
Roy V. Creasy (date)
Plan Administrator

STATE OF VIRGINIA)
) to-wit:
CITY OF ROANOKE)

The foregoing Certificate was subscribed and acknowledged before me this /S/ 24th day of /S/November, 1987, by Roy V. Creasy.

/S/Zella M. Field
Notary Public

My commission expires:

/s/April 16, 1991

(5)

No. 91-913

In The
Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX - VOLUME II

G. Steven Agee
Counsel of Record
OSTERHOUDT, FERGUSON, NATT, AHERON & AGEE, P.C.
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Roanoke, VA 24018
(703) 774-1197

Counsel for Petitioner

Robert A. Lefkowitz
Counsel of Record
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600 Ross Building
801 East Main Street
Richmond, VA 23219
(804) 644-0313

Counsel for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1991

CERTIORARI GRANTED JANUARY 21, 1992

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

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VOLUME II

The following decision, opinions, and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

COLEMAN FURNITURE CORPORATION
PENSION PLAN

EIGHTH AMENDMENT
CERTIFICATE OF VOTE

I, R. D. Gunn, HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held at the offices of the Corporation on /s/13th of May, 1980, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Pension Plan be amended effective as of December 1, 1978 as follows:

Section 16.4 is deleted in its entirety and the following Section 16.4 substituted therefor

16.4 <u>Benefits subject to adequacy of Trust Fund</u> The Company does not guarantee the payment of benefits hereunder and all persons shall look solely to the Trust Fund and the Pension Benefit Guaranty Corporation (PBGC) for any payments under the Plan. In all events, no Participant shall have any recourse toward the satisfaction of his Accrued Benefit from other than assets of the Plan or the PBGC, if there shall be a

PBGC liability present.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended or rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this <u>/s/13th</u> day of <u>/s/May</u>, 1980.

(Corporate Seal) <u>/s/R. D. Gunn</u> Secretary

COLEMAN FURNITURE COMPANY PENSION PLAN

SEVENTH AMENDMENT

CERTIFICATE OF VOTE

I, R. D. Gunn, HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Company ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held at the offices of the Corporation on /s/ May 8th, 1979, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: To amend the Coleman Furniture Pension Plan as follows:

A. Amendments effective January 1, 1979:

1. The phrase "(or be retired by the Company)" is deleted from the first sentence of Section 5.1.

2. The first sentence of Section 5.2 is amended to read as follows:

A Participant who remains in the employment of the Company after his normal retirement date may elect to retire on the first day of any month after such date.

B. Amendment effective January 1, 1978:

Section 2.20 is amended to read as follows:

2.20 Primary Social Security Benefit defined

"Primary Social Security Benefit" of a Participant as of any date (computation date) means his monthly primary insurance amount under the

Social Security law (the Federal Social Security Act, as amended, and regulations, rulings and judicial decisions thereunder), computed on the basis of the following assumptions:

(a) That the first month for which he is entitled to old-age insurance benefits under such law is the later of the calendar month in which the computation date occurs and the calendar month in which his 65th birthday occurs;

(b) That he will have no compensation for the purposes of such law in or after the calendar year in which the later of such calendar months occurs;

(c) That, in the case where the computation date occurs in an earlier calendar year than the calendar year in which his 65th birthday occurs, his compensation for the purposes of such law during the calendar year in which the computation date occurs and during each subsequent calendar year, if any, prior to the calendar year in which his 65th birthday occurs will be the same as his current applicable compensation on the computation date;

(d) That the taxable wage base applicable to the calendar year in which the

computation month occurs continues to be applicable to each subsequent calendar year (where the computation month is the calendar month next preceding the calendar month in which the computation date occurs, if the computation date occurs on the first day of a calendar month, but if the computation date does not occur on the first day of a calendar month, the computation month is the calendar month in which the computation date occurs);

(e) That no cost-of-living increases in benefits are required for any calendar month after the computation

month;

(f) That, for the purposes of determining his average indexed monthly earnings and of determining his primary insurance amount from his average indexed monthly earnings (where either such determination is required), the index wages (the average of the total wages reported to the Secretary of the Treasury for any calendar year for use in compiling the indexes employed in computing average indexed monthly earnings, all as prescribed by the Social Security law) for each calendar year after the

reference year (the second calendar year preceding the calendar year in which the computation month occurs) are the same as for the reference year;

(g) That amendments to the Federal Social Security Act which become law more than six months after the computation date are not in effect;

(h) That, if the computation date occurs before January 2, 1979, the Social Security Amendments of 1977 are not in effect;

(i) That, if the computation date is his normal retirement date and occurs on a January 1st, he had no

compensation for the purposes of the Social Security law in the calendar year immediately preceding the computation date.

There shall be no change in the Primary Social Security Benefit of a Participant after the termination of his employment, except as provided in Section 6.4 and except as otherwise specifically provided elsewhere in the Plan.

C. Amendments effective December 1, 1976:

1. Paragraph (c) of Section 4.1 is deleted and Paragraphs (d) and (e) are relettered as (c) and (d).

2. Paragraph (d) of Section 4.2 is deleted.

3. Section 4.3(a)(i) is amended by inserting the phrase, "or eligibility computation period", immediately after the phrase, "Plan Year".

4. Section 4.3(a)(ii) is amended by inserting the phrase, "or eligibility computation period", immediately after the phrase, "Plan Year".

5. Section 4.3(a)(iii) is amended to read as follows:

(iii) each hour for which the Employee is directly or indirectly paid, or entitled to payment, by the Company or an Affiliated

Company for reasons (such as vacation, sickness or disability) other than for the performance of duties, such hours to be determined and credited pursuant to the provisions of paragraphs (b) and (c) of Section 2530.200b-2 of the regulations issued by the United States Department of Labor under ERISA defining "hour of service", which paragraphs are hereby incorporated herein by reference.

6. Section 4.3(b) is amended to read as follows:

(b) For the purpose of determining Benefit Accrual - Service, an Hour of Service

for an Employee means an hour determined in accordance with paragraph (a) above, but any hour attributable to employment with an Affiliated Company shall be disregarded.

7. Section 5.4 is amended to read as follows:

5.4 Retirement defined

As used in this Plan, "retirement" means termination of employment with the Company on a normal, early, disability or deferred retirement date of a Participant who is eligible to retire on such date in accordance with the provisions of the Plan, and

no benefits shall become payable to a Participant or former Participant before his termination of employment with the Company. However, if the termination of employment of a Participant with the Company occurs on a day when he meets all the eligibility requirements of the Plan for retirement except that such day is not the first day of a month, such termination shall nevertheless be considered a retirement, but his retirement date shall be the first day of the month next following such termination, if he is

living on such day, and his death between such termination and such day shall be considered death while in the employment of the Company.

8. Article VI is amended by adding the following new Section 6.6 at the end thereof:

6.6 <u>Provision to prevent benefit duplication with other plans</u>

Notwithstanding any other provision of the Plan to the contrary, benefits of an Employee payable under the Plan attributable to the same service to which other pension benefits of such Employee are also attributable shall be

reduced (but not to less than zero) by the actuarial equivalent of such other benefits. For this purpose, "other pension benefits" are benefits payable under another defined benefit pension plan which is qualified under Section 4.01(a) or 4.03(a) (or any replacing section) of the Internal Revenue Code and to which the Company contributes or has contributed.

9. Section 7.1 is amended by changing the phrase, "normal retirement date", to "65th birthday".

10. Article VIII is amended to read as follows:

ARTICLE VIII

NORMAL FORM OF RETIREMENT BENEFITS

8.1 Normal form of pension

Except as otherwise provided in Sections 8.2 and 8.3, the normal form of pension payable under the Plan to a Participant shall be a monthly pension payable to the Participant during his lifetime, the first payment to be due on the date of commencement of his benefits under the Plan, and the last payment to be due on the first day of the calendar month in which his death occurs.

8.2 Normal form of pension for Participants married on date benefits commence

The normal form of pension payable under the Plan to a Participant who (i) begins to receive his benefits under the Plan on or after his normal

retirement date or the date on which he has satisfied the requirements for early retirement under Section 5.3, (ii) is married on the date payment of such benefits commence and (iii) has not made an election under Section 8.4, shall be the joint and survivor form of payment with the person to whom the Participant was married on the date payment of such benefits commence designated as his joint annuitant. Under this form of payment, the Participant shall receive a monthly pension beginning on the date of commencement of his benefits under the Plan and payable during his lifetime, the amount of such pension to be the Actuarial Equivalent of the pension payable in the normal form described in Section 8.1. If the Participant predeceases his joint

annuitant, then fifty percent (50%) of the Participant's reduced pension shall be paid to the joint annuitant during such person's remaining lifetime, the first such payment to commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of the calendar month in which the joint annuitant dies. However, if the joint annuitant to whom a survivor annuity is payable under this Section 8.2 predeceases the Participant, the Participant shall continue to receive his actuarially reduced pension during his remaining lifetime, the last such payment to be due on the first day of the month in which he dies.

8.3 <u>Normal form of pension for certain Participants married on date of death</u>

The normal form of pension payable under the Plan to a Participant (i) who dies on or after his 65th birthday while in the employment of the Company and while the pre-retirement death benefit described in Sections 10.4 and 10.5 is not in effect for him, or (ii) whose employment with the Company terminates (due to retirement or any other reason but death) on or after his 65th birthday or the date on which he has first satisfied the age and service requirements for early retirement under Section 5.3 and thereafter dies before the commencement of his benefits under the Plan, (iii) who is married on the date of his death and (iv) who has not made an election under Section 8.4 prior to his death, shall be the joint and

survivor form of payment described in Section 8.2 with his surviving spouse (that is, the person to whom he was married on the date of his death) designated as his joint annuitant. The monthly pension payable to the surviving spouse shall be determined as if the Participant had lived to begin receiving his pension under such form (with such designated joint annuitant) on the first day of the calendar month next following his death and had thereafter died in such month and, if he dies while in the employment of the Company, as if his employment had terminated just before his death. However, such pension shall commence on the first day of the calendar month next following his death, if his surviving spouse is living on that day, notwithstanding

the fact that the next preceding sentence would call for such pension to commence on the first day of the calendar month next following the Participant's assumed date of death.

8.4 Election not to take the joint and survivor annuity

A married Participant may elect not to take the joint and survivor annuity described in Section 8.2 by delivering to the Committee, during the election period described below, his written election to have his benefits paid in the normal form of payment described in Section 8.1 or in an optional form of payment described in Article IX. The election period during which the Participant may elect not to take such joint and survivor annuity is the period beginning on the date the information described in the first

sentence of Section 8.5 is furnished to him and ending on the date payment of his benefits under the Plan commence, provided, however, that in no event shall such election period be less than 90 days. It is further provided, that if the Committee is required to furnish to the Participant the additional information described in the third sentence of Section 8.5, such election period shall be extended to the extent necessary to include the 90 days immediately following the date such additional information is mailed or personally delivered to the Participant. The Participant may revoke such election by filing a written revocation with the Committee at any time during such election period and such revocation shall be effective upon receipt by the

Committee. No such revocation shall prevent the Participant from making a subsequent election not to take the joint and survivor annuity under the conditions described above.

8.5 Information to be furnished to Participant

The Committee shall furnish the Participant a general description, written in non technical language, of the joint and survivor annuity described in Section 8.2, the circumstances under which such annuity shall be provided unless he elects not to take such annuity, the availability of such election and a general explanation of the relative financial effect upon his pension of making such an election. Such information shall be furnished to the Participant approximately nine months before (i)

the date he will first satisfy the age and service requirements for early retirement under Section 5.3, or (ii) his 65th birthday, whichever is earlier, provided, however, that, if he satisfies such early retirement requirements on the date that he commences his participation in the Plan or if he commences such participation at, after or within nine months before his 65th birthday, such information shall be furnished to him on or about the date he commences such participation. The Committee shall also furnish the Participant, upon his written request delivered to the Committee within the election period described in Section 8.3, a written explanation, in non-technical language, of the terms and conditions of such annuity and the financial

effect upon his pension (in terms of dollars per pension payment) of making an election not to take such annuity. Such additional information shall be furnished to the Participant within 30 days following the date the Participant's written request is received by the Committee.

8.6 Special election

In the case of a Participant whose death, retirement or termination of employment occurred after November 30, 1976 and to whom an election not to receive his pension in the form of a qualified joint and survivor annuity (an annuity for the life of the Participant with a survivor annuity for the life of his spouse which is neither (A) less than 50% of, nor (B) more than 100% of, the annuity payable during the joint lives of the

Participant and his spouse) has not been previously made available (and will not become available in normal course), such Participant (or, if he has died, his personal representative) may make an election (whether or not such spouse is then still living) to receive the balance of such pension (with appropriate adjustment of such benefit to reflect payments received in the form of a qualified joint and survivor annuity prior to the exercise of such election) in the form of a monthly pension for the life of the Participant only or in any form of pension described in Section 9.3 or permitted by the Company and the Trustee under Section 9.4. Such election may be made at any time before the 91st day following the day the Committee mails or personally

delivers to the Participant (or his personal representative) notice of the availability of such election and the applicable information described in the first sentence of Section 8.5. However, if the Participant (or his personal representative) makes a request before such 91st day for the additional information described in the third sentence of Section 8.5, the Committee shall personally deliver or mail (first class mail, postage prepaid) such information to the Participant (or his personal representative) within 30 days from the date of such request (and the Committee need comply with only one such request) and the time for making such election shall be extended to the extent necessary to include the 90 calendar days immediately following

the day the requested additional information is mailed or personally delivered to the Participant (or his personal representative). Such election, to be effective, must be submitted to the Committee in writing.

8.7 Applicability to former Participant

For purposes of this Article VIII, the term "Participant" shall include a former Participant.

11. Section 9.8 is amended to read as follows:

9.8 Small pensions

If the monthly amount of any pension hereunder is less than ten dollars, the Committee may, in its sole discretion, direct the Trustee to pay such pension quarterly, semi-annually, annually or in a lump sum, in an amount which is the Actuarial

Equivalent of such pension, but such pension shall not be paid in a lump sum pursuant to this Section 9.8 if the lump sum Actuarial Equivalent of such pension is more than $1,750.

12. The following new sentences are added at the end of Section 10.3:

Furthermore, if the spouse of a deceased Participant or former Participant is entitled to receive a benefit under the Plan in respect of such Participant or former Participant in the form of a life annuity and if such spouse, pursuant to the first sentence of this Section 10.3, makes a request to the Committee in writing to receive such benefit in some other manner, the Committee shall furnish such spouse, within a reasonable amount of time after the Committee receives such request, a written

explanation in nontechnical language of the life annuity and any other form of payment which may be selected. This explanation must state the financial effect (in terms of dollars) of each such form of payment. The Committee need not respond to more than one such request.

13. Section 10.4. is amended to read as follows:

10.4 Automatic pre-retirement death benefit

If a married Participant dies after November 30, 1976, before his normal retirement date, while in the employment of the Company and after he has satisfied the age and service requirements for early retirement (as set forth in Section 5.3), his spouse shall be eligible for the spouse's pension described in Section 10.5.

below. (As used in this Section 10.4 and in Section 10.5. below, the term "Participant" shall include the meaning "former Participant".)

14. The second sentence of Section 10.5 is amended to read as follows:

The Participant's assumed pension is the monthly pension the Participant would have received under the Plan if his employment had terminated just before his death and he had lived to begin receiving his pension under the joint and survivor form of payment described in Section 8.2 on the first day of the calendar month next following his death, with his surviving spouse (that is, the person to whom he was married on the date of his death) designated as his joint annuitant.

15. The following new sentence is added at

the end of Section 14.3(g):

The provisions of this Section 14.3 requiring Participants' interest to become nonforfeitable upon termination or partial termination of the Plan are subject to the provisions of Article XV and provisions of the Plan calling for reduction or cancellation of benefits by reason of death.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended or rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this /s/ 8th day of /s/ May, 1979.

(Corporate Seal) /s/ R. D. Gunn Secretary

COLEMAN FURNITURE COMPANY

SIXTH AMENDMENT

CERTIFICATE OF VOTE

I. R. D. Gunn HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held on November 18, 1977, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Company Pension Plan be amended effective as of December 1, 1976 as follows:

Article X is amended by deleting all of the provisions which follow Section 10.3 in said

Article X and substituting therefor Section 10.4 and 10.5 which shall read as follows:

10.4 Automatic pre-retirement death benefit

If a married participant dies after November 30, 1976, before his actual retirement date, while he is an employee and after he has met the standard for early retirement as set forth in Article V above, his spouse shall be eligible for the spouse's pension described in Section 10.5 below.

10.5 Amount, commencement date and form of pre-retirement death

benefit

The monthly amount of the spouse's pension payable to the spouse of a participant whose spouse is eligible therefor shall be equal to 50% of the monthly amount of the participant's assumed pension. The participant's assumed pension is the monthly pension the participant would have received under the Plan if he had retired on the first day of the calendar month in which he dies (with the contingent pensioner option in effect and with provision for continuance after his death of 50% of his pension to

his spouse) and had immediately commenced receiving his pension under such option. Payment of the spouse's pension shall commence to the participant's spouse on the first day of the calendar month next following the month in which the participant dies, if said spouse is living on such day. A monthly payment (equal to the monthly amount of such spouse's pension) shall be payable to said spouse on such day and on the first day of each calendar month beginning after such day and on or before the day

said spouse dies.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended and rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this day of December 8, 1977.

/s/ R. D. Gunn Secretary

(Corporate Seal)

COLEMAN FURNITURE COMPANY

FIFTH AMENDMENT

CERTIFICATE OF VOTE

I, /s/ R. D. Gunn HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held on /s/ 11-18-77 1977, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Company Pension Plan be amended effective as of December 1, 1976 as follows:

The language of Section 2.4 is deleted in its entirety and the following language is substituted therefor:

2.4 "Annual Compensation" of an Employee means all amounts paid by the Company to an Employee for the services rendered by such Employer to the Company as reportable to the Internal Revenue Service on its Form W-2 (or any replacing form).

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended and rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this day of /s/ 11-18, 1977.

/s/ R. D. Gunn Secretary

(Corporate Seal)

COLEMAN FURNITURE CORPORATION

PENSION PLAN

Effective Date

December 1, 1963

As Amended and Restated

by the Fourth Amendment

Effective December 1, 1976

(Table of Contents Omitted in Printing)

ARTICLE I

ESTABLISHMENT OF PLAN

1.1 Designation and purpose of Plan

The Plan shall be known as the "Coleman Furniture Corporation Pension Plan". The purpose of the Plan is to provide retirement benefits for eligible Employees of the Company and their beneficiaries.

1.2 Effective date of Plan

The effective date of the Plan is December 1, 1963. In order to comply with ERISA, the Plan was amended and restated in its entirety by the Fourth Amendment, effective December 1, 1976.

1.3 Limitation on applicability of Plan

Except as may specifically be provided elsewhere herein, this instrument shall not apply to any former Employee whose active employment with the

Company ceased prior to December 1, 1963 and who is not subsequently reemployed. Furthermore, changes made by the Third Amendment shall not apply to any former Employee whose employment with the company terminated prior to December 1, 1976 and who is not subsequently reemployed.

ARTICLE II

DEFINITIONS

(In Alphabetical Order)

Unless otherwise plainly required by context, the following words and phrases when used herein shall have the following meanings:

2.1 "Accrued Benefit" of a Participant means as of any date of reference (the date his Accrued Benefit is to be computed), a monthly pension payable in the normal form of pension payment, in an amount determined in accordance

with the normal retirement benefit formula described in Section 6.1 and based upon his Final Average Annual Compensation, Primary Social Security Benefit and Benefit Accrual Service as of the date of reference. It is provided, however, that such Accrued Benefit shall not exceed the greater of:

(a) $1.25 multiplied by the total amount of his Benefit Accrual Service as the date of reference, not to exceed 20 years;

(b) The monthly pension to which he would be entitled commencing at his normal retirement date determined under the normal retirement benefit formula (based upon his Final Average Annual Compensation and Primary

Social Security Benefit as of the date of reference, but based upon the total amount of Benefit Accrual Service which he would have at his normal retirement date if he should continue to accrue Benefit Accrual Service from the date of reference to his normal retirement date) multiplied by a fraction, the numerator of which is the total amount of his Benefit Accrual Service at the date of reference and the denominator of which is the total amount of Benefit Accrual Service which he would have at his normal retirement date if he should continue to accrue Benefit Accrual Service from the date of reference to his normal retirement date.

2.2 "Actuarial Equivalent" of a benefit means another benefit, differing in time, period or manner of payment, of equivalent value when computed on the basis of consistently applied reasonable actuarial methods, factors and assumptions chosen by a qualified actuary and approved by the Committee. Such methods, factors and assumptions need not be the same as those used in actuarial valuations of the Plan.

2.3 "Affiliated Company" means (i) any trade or business (other than the Company) which, as determined under regulations of the Secretary of the Treasury, is under common control with the Company, or (ii) any corporation (other than the Company) which is included in a controlled group of corporations (within the meaning of Section 1563 of the Internal Revenue

Code of 1954 without regard to Section 1563(a)(4) and Section 1563(e)(3)(C) of such Code) in which the Company is also included.

2.4 "Annual Compensation" of an Employee means the basic annual rate of compensation paid to such Employee by the Company for services rendered by such Employee to the Company. For all purposes hereunder, the basic annual rate of compensation attributable to any twelve month period shall be the basic annual rate of compensation in effect on the December 1 falling within such period. In the case of an Employee who is paid by the Company on an hourly basis, his basic annual rate of compensation shall be his basic hourly rate multiplied by the maximum number of hours per year for which straight time is paid as determined

under the Fair Labor Standards Act, as amended from time to time.

2.5 "Benefit Accrual Service" of an Employee means the Benefit Accrual Service as provided in Section 4.1.

2.6 "Committee" means the person or persons appointed by the Company to assist in the administration of the Plan pursuant to Section 12.1.

2.7 "Company" means Coleman Furniture Corporation and any successor thereto.

2.8 "Eligibility Service" of an Employee means the Eligibility Service as provided in Section 3.4.

2.9 "Eligible Employee" means an Employee (i) whose employment is not subject to the terms of a collective bargaining agreement, or (ii) who is in a class of Employees whose employment is subject to the terms of a collective bargaining agreement and the terms of

such agreement (or any collateral written or oral agreement) specifically provide for inclusion in this Plan of Employees in such class.

2.10 "Employee" means any person who is employed by the Company.

2.11 "Employment Commencement Date" of an Employee means the date on which he first performs an Hour of Service, provided, however, that if an Employee sustains a Substantial Break in Service, his Employment Commencement Date shall be the first day following such Substantial Break in Service on which he performs an Hour of Service.

2.12 "Entry Date" means December 1, 1976 and the first day of each month thereafter.

2.13 "ERISA" means the Employee Retirement Income Security Act of 1974 as amended from time to time and any regulations

issued pursuant thereto as such Act affects this Plan.

2.14 "Final Average Annual Compensation" of an Employee as of any date (his computation date) means his Annual Compensation averaged over the most recent 120 months of his participation in the Plan before his normal retirement date and through his computation date. However, if his Final Average Annual Compensation is to be determined as of any computation date when he has completed fewer than 120 months of participation in the Plan before his normal retirement date, his Final Average Annual Compensation shall be his Annual Compensation averaged over the most recent 120 months (or if shorter, the entire period) of his employment with the Company before his normal

retirement date and through his computation date (whether or not such employment is renderd as a Participant). It is further provided that in determining his Final Average Annual Compensation, his participation, employment with the Company and Annual Compensation before a Substantial Break in Service shall be disregarded.

2.15 "Hour of Service" of an Employee means an Hour of Service as provided in Section 4.3.

2.16 "One-Year Break in Service" of an Employee means any Plan Year during which he is not credited with more than 500 Hours of Service.

2.17 "Participant" means ay Employee who is or becomes a Participant in the Plan as provided in Article III.

2.18 "Plan" means the Coleman Furniture

Corporation Pension Plan as evidenced by this instrument, as amended from time to time.

2.19 "Plan Year" means the 12-month period which begins on December 1st of each year.

2.20 "Primary Social Security Benefit" of a Participant as of any date (computation date) means his monthly primary insurance amount under the Social Security law (the Federal Social Security Act, as amended, and regulations, rulings and judicial decisions thereunder) in effect on such date (including amendments to the Social Security Act made effective retroactively for not more than six months) computed on the basis of the following assumptions:

(a) That the first month for which he is entitled to old-age

insurance benefits under such law is the later of the month in which the computation date occurs and the month in which his 65th birthday occurs;

(b) That he will have no compensation for the purposes of such law on or after the later of such months;

(c) That, in a case where the computation date occurs in an earlier calendar year than the calendar year in which his 65th birthday occurs, his compensation for the purposes of such law during the calendar year in which the computation date occurs and during each subsequent calendar year, if any, prior to the calendar year in which his 65th birthday

occurs will be the same as his current Annual Compensation on the computation date;

(d) That the methods and factors (the taxable wage base, level of benefits and any other factors) prescribed by the Social Security law for computing a primary insurance amount for the calendar month immediately preceding the computation date continue to be applicable to the computation of a primary insurance amount for all future months.

There shall be no change in the Primary Social Security Benefit of a Participant after the termination of his employment with the Company, except as provided in Section 6.4 and except as otherwise specifically provided elsewhere in the

Plan.

2.21 "Substantial Break in Service" An Employee shall incur a Substantial Break in Service if, at the time when he incurs one or more One-Year Breaks in Service, he has no vested interest under the Plan (pursuant to Section 7.1) and the number of consecutive One-Year Breaks in Service which occur during such break equals or exceeds the aggregate number of his years of Eligibility Service, not counting in such aggregate number any year of Eligibility Service previously excluded in respect of an earlier Substantial Break in Service.

2.22 "Trust Agreement" means the Trust Agreement entered into with the Trustee in accordance with Article XIII.

2.23 "Trustee" means the party or parties,

individual or corporate, named in the Trust Agreement as Trustee and any duly appointed additional or successor Trustee or Trustees acting thereunder.

2.24 "Trust Fund" means the Fund established pursuant to the Trust Agreement and shall include all the assets and other property held by the Trustee under the Trust Agreement.

2.25 "Vesting Service" of an Employee means the Vesting Service as provided in Section 4.2

2.26 Wherever appropriate, words used in the Plan in the singular may mean the plural, the plural may mean the singular, and the masculine may mean the feminine.

ARTICLE III

PARTICIPATION IN THE PLAN

3.1 Date of participation

Each Employee on December 1, 1976 who

was a Participant under the Plan on November 30, 1976 shall continue to be a Participant in accordance with the provisions of the Plan as it is herein amended and restated. Each other Employee on December 1, 1976 and each person who thereafter becomes an Employee shall become a Participant in the Plan on the earliest Entry Date on which he is an Eligible Employee after having completed one year of Eligibility Service and attained age 25.

3.2 Rentry into the Plan

An Employee who terminates his participation in the Plan for any reason (pursuant to Section 3.3) shall resume his participation on the earliest Entry Date subsequent to such termination on which he is again an Eligible Employee, provided, however,

that if he sustains a Substantial Break in Service following such termination of participation, he shall not resume his participation in the Plan until the earliest Entry Date subsequent to such termination on which he is again an Eligible Employee and has completed one year of Eligibility Service following such Break in his service.

3.3 Terminatin of participation

A Participant shall terminate his participation in the Plan when he ceases to be an Eligible Employee due to his termination of employment with the Company (because of his death, retirement or any other reason) or due to a transfer in his position with the Company or a change in his job classification with the Company.

3.4 Eligibility Service

An Employee shall be credited with one (1) year of Eligibility Service for each eligibility computation period during which he completes 1000 or more Hours of Service, provided, however, that if he incurs a Substantial Break in Service, any year of Eligibility Service before such Substantial Break in Service shall be disregarded.

3.5 Eligibility computation period defined

The "eligibility computation period" of an Employee means the 12-consecutive-month period beginning on his Employment Commencement Date, subject to the following special rules:

(a) If the Employee fails to complete a year of Eligibility Service during the first such period, his eligibility computation period shall switch

to the Plan Yer which includes the first anniversary of his Employment Commencement Date and, if necessary, each succeeding Plan Year until he completes a year of Eligibility Service.

(b) After the Employee completes a year of Eligibility Service, his eligibility computation period shall shift to the Plan Year, beginning with the Plan Year which includes the date on which he completes such year of Eligibility Service.

3.6 Requirement that participant furnish relevant information

Anything herein to the contrary notwithstanding, each Participant must, as a condition of participation, execute such instruments as may be

required of him, produce such evidence of age as may reasonably be required of him, and answer truthfully and completely, without mental reservation or concealment, any question or request for information relating to such participant's benefits hereunder.

ARTICLE IV

BENEFIT ACCRUAL SERVICE; VESTING SERVICE; HOUR OF SERVICE

4.1. Benefit Accrual Service

An Employee shall be credited with one (1) year of Benefit Accrual Service for each Plan Year during which he completes 1000 or more Hours of Service subject to the following special rules:

(a) The amount of Benefit Accrual Service credited to an Employee for the period before December 1, 1976 shall be equal to the amount of service credited to

him for such period for purposes of benefit accrual under the Plan as determined by the applicable provisions of the Plan in effect from time to time before such date;

(b) In the case of an Employee who incurs a Substantial Break in Service, any year of Benefit Accrual Service before such Substantial Break in Service shall be disregarded;

(c) In the case of an Employee who becomes a Participant (or resumes his Participation) on a date other than the first day of a Plan Year, and who completes less than 1000 Hours of Service during such Plan Year, he shall receive credit for a partial year of Benefit Accrual Service

for such Plan Year, provided the number of Hours of Service completed by him during such Plan Year, when annualized, equal at least 1000 hours. The amount of such partial year of Benefit Accrual Service shall be determined by a fraction, the numerator of which shall be the number of days that he was a Participant during such Plan Year and the denominator of which shall be the number of days in such Plan Year.

(d) In the case of an Employee who first becomes a Participant in the Plan on December 1, 1976 and who, on such date, does not satisfy the eligibility requirements of the Plan as in effect on November 30, 1976, any

Benefit Accrual Service before December 1, 1976 shall be disregarded. (For example, an Employee who was a part-time Employee on November 30, 1976, but how, nevertheless, entered the plan on December 1, 1976 pursuant to Section 3.1, shall not be credited with any Benefit Accrual Service for his employment before his entry into the Plan);

(e) Any year of Benefit Accrual Service which begins after the Employees normal retirement date shall be disregarded.

4.2 Vesting Service

An Employee shall be credited with one (1) year of Vesting Service for each Plan Year during which he completes 1000 or more Hours of Service subject

to the following special rules:

(a) Any year of Vesting Service before December 1, 1976 shall be disregarded if such year of Vesting Service would have been disregarded under the rules of the Plan with regard to breaks in service and length of service in effect from time to time before such date;

(b) In the case of an Employee who incurs a Substantial Break in Service, any year of Vesting Service before such Substantial Break in Service shall be disregarded;

(c) Any year of Vesting Service at the close of which the Employee has not attained age 22 shall be disregarded;

(d) If an Employee's first year of

Eligibility Service overlaps two Plan Years, neither of which is a year of Vesting Service, then such year of Eligibility Service shall also be credited to the Employee as a year of Vesting Service, unless such year of Vesting Service would be disregarded under paragraphs (a), (b) and (c) above.

4.3 <u>Hour of Service</u>

(a) <u>For the purpose of determining Eligibility Service, Vesting Service, the Employment Commencement Date of an Employee, and whether a Plan Year is a One-Year Break in Service</u>, an Hour of Service for an Employee means:

(i) each hour for which the Employee is directly or

indirectly paid, or entitled to payment, by the Company or an Affiliated Company for the performance of duties, each such hour to be credited to the Employee for the Plan Year in which the duties were performed; and

(ii) each hour, not included under subparagraph (i) above, for which back pay, irrespective of mitigation of damages, has been either awarded to the Employee or agreed to by the Company or an Affiliated Company, each such hour to be credited to the Employee for the Plan Year to which the award or agreement pertains; and

(iii) each hour for which the Employee is directly or indirectly paid, or entitled to payment, by the Company or an Affiliated Company for reasons (such as vacation, sickness or disability) other than for the performance of duties, each such hour to be credited to the Employee for the Plan Year during which either payment is actually made or amounts payable come due. The number of such hours shall be determined by dividing the payments received or due by the lesser of (A) the Employee's most recent hourly rate of compensation

for the performance of duties and (B) the Employee's average hourly rate of compensation for the performance of duties for the most recent Plan Year in which he completed more than 500 Hours of Service, and

(iv) each non-compensated hour during which the Employee is on a period of absence from active employment with the Company or an Affiliated Company for (A) military service when required by law, provided he returns to work with his employer within 90 days after release from military duty, or any longer period

during which his reemployment rights are protected by law, (B) temporary layoff, for a period not to exceed 6 months, provided he returns to work when recalled by his employer, and (C) leave of absence for sickness, accident, disability or any other reason for the period authorized by his employer, provided he returns to work at the expiration of such period, each such hour to be credited to him on the basis of the number of hours (not to exceed 40 for a full week and a pro-rate portion of 40 for a partial week) that he would

normally have worked during such period of absence.

(b) For the purpose of determining Benefit Accrual Service, an Hour of Service for an Employee means an hour determined in accordance with Paragraph (a) above, with the following exceptions:

(i) any hour attributable to employment with an Affiliated Company shall be disregarded;

(ii) any hour attributable to a period of absence from active employment with the Company during which he does not receive his regular compensation shall be disregarded.

ARTICLE V

RETIREMENT DATES

5.1 Normal retirement date

A Participant may elect to retire ~~(or be retired by the Company)~~ [the preceding "(or be retired by the Company)" has been manually crossed out] on his normal retirement date, which shall be the first day of the month coincident with or next following the later of his 65th birthday and the tenth anniversary of the date he commenced his participation in the Plan. A Participant who retires on his normal retirement date shall receive a monthly pension payable in the normal form of pension payment and commencing on his normal retirement date in the amount specified in Section 6.1.

5.2 Deferred retirement date

~~With the consent of the Company~~, [the preceding "With the consent of the

Company" has been manually crossed out] a Participant may remain in the active employment of the Company after his normal retirement date and may elect to retire (or be retired by the Company) on the first day of any month after his normal retirement date. His date of actual retirement under this Section 5.2 shall be known as his deferred retirement date. A Participant who retires after his normal retirement date shall receive a monthly pension payable in the normal form of pension payment and commencing on his deferred retirement date in an amount specified in Section 6.2.

5.3 Early retirement date

A Participant who has completed at least thirty (30) years of Benefit Accrual Service may elect to retire on

an early retirement date which may be the first day of any subsequent month prior to his normal retirement date. A Participant who retires on an early retirement date shall receive a pension payable in the normal form of pension payment and commencing, at his option, on his early retirement date or the first day of any subsequent month, but in no event later than his normal retirement date, in the amount specified in Section 6.3.

5.4 Retirement defined

As used in this Plan, "retirement" means the cessation of active employment with the Company on a normal, or early retirement date of an Employee who is eligible to retire on such date in accordance with the provisions of the Plan, and no benefits shall become payable to a

Participant prior to his cessation of employment with the Company.

5.5 Non-duplication provision

An early or deferred retirement benefit shall be paid in lieu of, not in addition to, a normal retirement benefit.

ARTICLE VI

AMOUNT OF RETIREMENT BENEFITS

6.1 Normal retirement benefit

Subject to the provisions of Section 6.5, the amount of monthly pension payable to a Participant who retires on his normal retirement date pursuant to Section 5.1 shall be equal to the greater of:

(a) One-twelfth of 50 percent of his Final Average Annual Compensation, less 83 1/3 percent of his Primary Social Security Benefit, multiplied by

a fraction (not to exceed one) the numerator of which shall be the total number of years of his Benefit Accrual Service (recognizing a fraction of a year) and the denominator of which shall be 20; and

(b) The lesser of (i) \$25.00 and (ii) \$1.25 multiplied by the total number of years of his Benefit Accrual Service (recognizing a fraction of a year).

It should be pointed out, however, that if the provisions of Section 8.2 are applicable (normal form of payment for certain married Participants), the amount of monthly pension payable hereunder shall be the Actuarial Equivalent of the monthly amount of pension determined above.

6.2 Deferred retirement benefit

Subject to the provisions of Section 6.5, the amount of monthly pension payable to a Participant who retires on his deferred retirement date pursuant to Section 5.2 shall be equal to the greater of:

(a) One-twelfth of 50 percent of his Final Average Annual Compensation increased to reflect the later commencement of his pension payments, less 83 1/3 percent of his Primary Social Security Benefit (determined as of his actual retirement date, notwithstanding the fact that his Final Average Annual Compensation is to be determined as of his normal retirement date) multiplied by a fraction, not to exceed one, the

numerator of which shall be the total number of years of his Benefit Accrual Service (recognizing a fraction of a year) and the denominator of which shall be 20; and

(b) The lesser of (i) $25.00, actuarially increased to reflect the later commencement of his pension payments and (ii) $1.25 multiplied by the total number of his years of Benefit Accrual Service (recognizing a fraction of a year), actuarially increased to reflect the later commencement of his pension payments.

It should be pointed out, however, that if the provisions of Section 8.2 are applicable (normal form of payment for certain married Participants), the

amount of monthly pension payable hereunder shall be the Actuarial Equivalent of the monthly amount of pension determined above.

6.3 Early retirement benefit

The monthly amount of pension payable to a Participant who retires on an early retirement date pursuant to Section 5.3, commencing on his normal retirement date, shall be his Accrued Benefit computed as of his early retirement date. If such early retirement pension commences before his normal retirement date, the monthly amount of such pension shall be the Actuarial Equivalent of his Accrued Benefit computed as of his early retirement date.

6.4 Provisions regarding multiple periods of employment

If the employment with the Company of

a Participant or former Participant terminates and if he is subsequently rehired and again becomes a Participant, appropriate actuarial adjustment shall be made in his benefit under the Plan to reflect any payments made under the Plan, (in a lump sum or otherwise) prior to his rehire, but the amount of his benefit shall not be less than if he had not been rehired. Furthermore, benefits otherwise payable to him during the period of his reemployment shall be deferred or suspended during such period, but if he had been receiving his pension under the joint and survivor option when he was rehired, his joint annuitant's right under such option to a continuing pension after his death shall not be impaired by reason of such deferral or suspension.

6.5 Maximum benefit allowed under the Plan

(a) Except as otherwise provided in paragraphs (b), (c), (d), (e), (f) and (g) of this Section 6.5, the annual amount of benefit of a Participant, (or former Participant) shall not exceed the lesser of:

(i) 75,000, or

(ii) 100% of his average annual compensation for the 3 consecutive calendar years as a Participant during which he received the greatest aggregate compensation (but, if he does not have 3 consecutive calendar years as a Participant, then such average shall be taken over his 3 consecutive calendar

years as an Employee during which he received the greatest aggregate compensation, and if he does not have 3 consecutive calendar years as an Employee, then such average shall be taken over his entire employment).

(b) If the benefit paid to a Participant is not in the form of a straight life annuity and if payment of such benefit begins on or after his 55th birthday, the maximum benefit (the maximum annual amount determined under paragraph (a) of this section and adjusted under paragraph (g) of this section) shall be actuarially adjusted to that annual amount

which would be the Actuarial Equivalent of the maximum benefit payable in the form of a straight life annuity beginning at the same time as the Participant's benefit. It is provided, however, that, if the benefit is paid in the form of a joint and survivor annuity (where the Participant's spouse is designated as his joint annuitant and where the designated percentage of the Participant's pension to be continued after the Participant's death is not less than 50%), the benefit shall be treated as if it were paid in the form of a straight life annuity for all purposes of this paragraph (b) and of paragraph

(c) of this section, which means that no adjustment in the maximum benefit need be made under this paragraph (b) and the adjustment in the maximum benefit required under paragraph (c) need reflect only commencement of payment before the Participant's 55th birthday.

(c) If payment of a benefit to a Participant begins before his 55th birthday, the maximum benefit shall be actuarially adjusted to that annual amount which, if paid in the same form and beginning at the same time as the Participant's benefit, would be the Actuarial Equivalent of the maximum benefit payable in the normal form of pension payment

beginning on the first day of the month coincident with or next following the Participant's 55th birthday.

(d) The limitations of paragraphs (a) and (b) of this section shall be deemed not to be exceeded if the annual amount of the Participant's benefit does not exceed $10,000 and if the Company or an Affiliated Company has not at any time maintained a defined contribution plan in which the Participant participated. The phrase "Affiliated Company" shall have the same meaning in this paragraph (d) as in paragraph (f) of this section.

(e) If the Participant has completed less than 10 years of Vesting

Service, the maximum amount determined under the foregoing provisions of this section shall be reduced by 10 percent for each year that the total number of his years of Vesting Service is less than 10.

(f) If the Participant has participated in any other pension plan maintained by the Company or an Affiliated Company (as defined in Section 2.3, but substituting the phrase "more than 50 percent" for the phrase "at least 80 percent" each place it appears in Section 1563(a)(1) of the 1954 Internal Revenue Code, for the purpose of determining what is a controlled group of corporations within the meaning of said Section

1563(a)(1)), the maximum amount as determined under the foregoing provisions of this section shall be reduced by any pension benefit to which he is entitled under such other plan.

(g) The $75,000 limit in paragraph (a)(i) above and, in the case of a Participant who is separated from service, the average annual compensation in paragraph (a)(ii) above shall be increased to reflect cost of living increases, as permitted under regulations issued by the Secretary of the Treasury.

ARTICLE VII

TERMINATION OF EMPLOYMENT AND VESTED RIGHTS

7.1 Vesting.

A Participant or former Participant

shall have a fully vested interest in his Accrued Benefit at all times after he (i) has reached his normal retirement date and is then or thereafter in the service of the Company or an Affiliated Company, or (ii) has completed 10 years of Vesting Service.

7.2 Special minimum vesting for Participants on November 30, 1976

An Employee who was a Participant in the Plan on November 30, 1976, shall not be vested in his Accrued Benefit at any time to a lesser extent than he would have been if the Plan had continued in effect after such date without amendment.

7.3 Determination of Accrued Benefit

If the participation of a Participant is terminated hereunder because his employment with the Company is

terminated, his Accrued Benefit is determined as of the date his participation and employment are terminated. (For provisions relating to multiple periods of employment, see Section 6.4.) If the participation of a Participant is terminated hereunder because he ceases to be an Eligible Employee due to transfer or change in employment status, his Accrued Benefit is determined as of the date his participation is terminated (or as of the date his last period of participation is terminated, if he has more than one period of participation before the termination of his employment).

7.4 Payment of Vested Interest

A Participant who terminates his participation in the Plan before he reaches his normal retirement date

(other than by death or early retirement) and who has a vested interest in his Accrued Benefit when his employment terminates (or who thereafter acquires a vested interest in his Accrued Benefit) shall be entitled to receive his vested interest in his Accrued Benefit as a monthly pension commencing on the first day of the month coincident with or next following his normal retirement date, or if he is in the employment of the Company on such date, the date on which his employment with the Company thereafter terminates. Such pension shall be payable in the normal form of payment, or in such optional form as he may elect, in accordance with the applicable provisions hereof. However, if he has completed at least

thirty (30) years of Benefit Accrual Service, he may elect to have the payment of such pension commence on the first day of any month before his normal retirement date (but not prior to the date of his termination of employment with the Company). If such election is made, the amount of such pension shall be the Actuarial Equivalent of his Accrued Benefit.

ARTICLE VIII

NORMAL FORM OF RETIREMENT BENEFITS

8.1 Normal form of pension

Except as otherwise provided in Section 8.2, the normal form of pension payable under the Plan to a Participant shall be a monthly pension payable to the Participant during his lifetime, the first payment to be due on the date of commencement of his benefits under the Plan, and the last

payment to be due on the first day of the calendar month in which his death occurs.

8.2 Normal form of pension for certain married Participants

The normal form of pension payable under the Plan to a Participant who is married on the date payment of his benefits under the Plan commence and who has not made an election under Section 8.3 shall be the joint and survivor form of payment with the person to whom the Participant was married on such date designated as his joint annuitant. Under this form of payment, the Participant shall receive a monthly pension beginning on the date of commencement of his benefits under the Plan and payable during his lifetime, the amount of such pension to be the Actuarial Equivalent of the

pension payable in the normal form described in Section 8.1. If the Participant predeceases his joint annuitant, then fifty percent (50%) of the Participant's reduced pension shall be paid to the joint annuitant during such person's remaining lifetime, the first such payment to commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of the calendar month in which the joint annuitant dies. However, if the joint annuitant to whom a survivor annuity is payable under this Section 8.2 predeceases the Participant, the Participant shall continue to receive his actuarially reduced pension during his remaining lifetime, the last such payment to be due on the first day of the month in

which he dies. Notwithstanding the foregoing provisions of this Section 8.2, if a married Participant remains in the employment of the Company after his normal retirement date and subsequently dies before the date payment of his benefits under the Plan have commenced, without having made an election under Section 8.3 prior to his death, his surviving spouse shall be entitled to receive a monthly pension payable during such spouse's remaining lifetime, such pension to be computed as if the Participant had retired on the first day of the month in which he dies with the joint and survivor annuity form of payment described in this Sectin 8.2 in effect and with his surviving spouse designated as his joint annuitant.

8.3 Election not to take the joint and

survivor annuity

A married Participant may elect not to take the joint and survivor annuity described in Section 8.2 by delivering to the Committee within 90 days before the date payment of his benefits under the Plan commence (the election period) his written election to have his benefits paid in the normal form of payment described in Section 8.1 or in an optional form of payment described in Article IX. Before he elects such normal form of pension payment, the Committee shall furnish him with the information described in Section 8.4. The Participant may revoke any election made under this Section 8.3 by filing a written revocation with the Committee any time prior to the date payment of his benefits under the Plan commences and

such revocation shall be effective upon receipt by the Committee. No such revocation shall prevent the Participant from making a subsequent election not to take the joint and survivor annuity under the conditions described above in this Section 8.3.

8.4 Information to be furnished to the Participant

Within a reasonable time after the first day of the election period described in Section 8.3, the Committee shall furnish the Participant a written notification, in non technical terms, of:

(a) the availability of the election described in Section 8.3, and

(b) the availability, upon his request, of the terms and conditions of the joint and survivor annuity described in

Section 8.2 and the financial effect upon his pension (in terms of dollars per pension payment) of making an election not to take such annuity.

8.4 Applicability to former Participants

For purposes of this Article VIII, the term "Participant" shall include a former Participant.

ARTICLE IX

OPTIONAL FORMS OF BENEFIT

9.1 Election of optional forms of payment

In lieu of receiving his pension in the normal form of pension payment described in Article VIII, a Participant may elect to receive his pension in one of the optional forms of payment described hereinafter. Payment in accordance with any such optional form shall commence on a date not later than his normal retirement

date or his date of actual retirement (or termination of employment with the Company). The amount of pension payable to the Participant in accordance with any such optional form shall be the Actuarial Equivalent of the pension payable in the normal form described in Section 8.1.

9.2 Joint and survivor option

Under this option, the Participant designates a person as his joint annuitant and also designates a percentage of the Participant's pension (100% or a smaller percentage) to be paid to such joint annuitant after the Participant's death. The first such payment to the joint annuitant shall commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of

the month in which the joint annuitant dies. (It should be noted that the normal form of pension payable under the Plan to a Participant who is married on the date his benefits under the Plan commence and who has not made an election under Section 8.3 is a joint and survivor form of payment with 50% of his pension to his spouse.) The amount of each such payment to the joint annuitant shall be the designated percentage of the Participant's pension, or, if the Participant dies before his pension has commenced (but on or after the effective date of such option), the amount of each such payment to the joint annuitant shall be designated percentage of the monthly amount of pension which the Participant would have received if he had commenced

receiving his pension under this option on the first day of the month in which his death occurred.

9.3 <u>Ten year certain and life option</u>

Under this option, if the Participant dies before receiving one hundred and twenty (120) monthly pension payments, his pension payments shall be continued after his death to the beneficiary (named by the Participant pursuant to Section 10.2) until the total number of monthly pension payments made to the Participant and his beneficiary equals 120 payments. The amount of each such payment to such beneficiary shall be the same as the monthly amount of pension which has been payable to the Participant before his death, under this option, or, if the Participant dies before his pension has commenced (but on or after

the effective date of such option), the amount of such payment to the beneficiary shall be the same as the monthly amount of pension which would have been payable to the Participant if he had commenced receiving his pension under this option on the first day of the month in which his death occurred.

9.4 Other options

Subject to the consent of the Company and the Trustee, a Participant may receive an Actuarial Equivalent of his pension in such other manner as he may elect, including a lump sum. An election under this section shall not, however, alter the terms and conditions of the Plan regarding a Participant's rights prior to his normal or early retirement date, nor shall any such election alter the

provisions of the Plan regarding permissible retirement dates.

9.5 Option effective date and other conditions

The election of an option by a Participant under the foregoing provisions of this article shall be subject to the following conditions:

(a) The Participant's election must be in writing and filed with the Committee, in such form as it shall prescribe. Such option shall become effective on the earlier of his normal and actual retirement date, or, if his participation terminates for a reason other than his retirement or death, the earlier of his normal retirement date and the date his pension payments commence (but no option shall

become effective prior to the date the option is elected.) It is provided, however, that an option elected under Section 9.4 shall become effective on the option effective date specified by the terms of the option. Notwithstanding the foregoing provisions of this paragraph (a), if an election is not filed at least one (1) year before the effective date of such election (as determined under the above provisions), such option shall not become effective unless evidence of his good health satisfactory to the Committee is furnished by the Participant to the Committee.

(b) An election may be revoked before the effective date of the

option upon the written request filed with the Committee by the Participant. An election may not be revoked after the effective date of the option.

(c) If a Participant for whom an option is in effect predeceases his joint annuitant or beneficiary (hereinafter referred to in this section as his "provisional payee") and the Participant's death occurs before the effective date of the option, the election shall cease to be effective and no benefit shall be paid to his provisional payee.

(d) If a Participant for whom an option is in effect predeceases his provisional payee and such death occurs on or after the

effective date of the option, his provisional payee shall be entitled to pension payments in accordance with the provisions of such option.

(e) If the provisional payee designated by the Participant under the option predeceases the Participant and such death occurs before the effective date of the option, such option shall be automatically revoked.

(f) If the provisional payee designated by the Participant under such option predeceases the Participant and if such death occurs on or after the effective date of the option, the Participant shall receive or continue to receive his actuarially reduced pension

payment in accordance with the provisions of such option.

In no event shall the provisions of this Section 9.5 apply to the joint and survivor normal form of payment set forth in Section 8.2.

9.6 <u>Limitations on options</u>

Notwithstanding the foregoing provisions of this Article IX to the contrary, an option elected by a Participant must satisfy the requirements of either (a) or (b) below.

(a) The actuarial value (determined as of his option effective date) of the benefits payable to him under the option during his lifetime must exceed one half of the actuarial value (determined as of his option effective date) of all benefits payable under

the option.

(b) The option provides for periodic payments beginning during the lifetime of the Participant or on a date which, considered when the option is elected, might occur during his lifetime (for example, his normal retirement date) and provides further that each payment during the Participant's lifetime will be made to the Participant, that the amount of each payment (if any) after his death will be no greater than the amount of each payment during his lifetime (except that adjustment for investment experience or in accordance with a generally recognized cost-of-living index may be provided) and payment

will not extend beyond the end of the longest of the following periods:

(i) the life of the Participant;

(ii) the lives of the Participant and his spouse;

(iii) the life expectancy of the Participant;

(iv) the joint and last survivor expectancy of the Participant and his spouse.

A period of life expectancy may begin on the Participant's option effective date, the date payment of benefits commences, or the date the participant's employment terminates. Such life expectancy shall be determined on the basis of facts existing on the date such period begins and shall not exceed the period

calculated by the use of the expected return multiples contained in Section 1.72 - 9 of the Income Tax Regulations or any successor section.

9.7 Applicability to former Participants

As used in this article, the term "Participant" shall be deemed to include former Participants.

9.8 Small pensions

If the monthly amount of any pension hereunder is less than ten dollars, the Committee may, in its sole discretion, direct the Trustee to pay such pension quarterly, semi-annually, annually or in a lump sum, in an amount which is the Actuarial Equivalent of such pension.

ARTICLE X

DEATH BENEFITS

10.1 Death benefits

Except as may be provided under a form

of pension payment or as may be provided under the pre-retirement death benefit option described in Section 10.4, there shall be no death benefits payable under the Plan.

10.2 Beneficiary

A Participant electing an optional from (sic) of benefit under which benefits may become payable after his death in a lump sum or for a period determined without reference to the duration of any person's life may designate one or more direct or contingent beneficiaries in writing on forms supplied by the Committee. A Participant or former Participant may change his designation at any time in the same manner. Any portion of a Participant's or former Participant's death benefit which is not disposed of under a designation of beneficiary for

any reason whatsoever shall be paid to his

(a) spouse,

(b) natural and adopted children and survivors thereof, in equal shares,

(c) parents and survivor thereof, in equal shares,

(d) brothers and sisters and survivors thereof, in equal shares, or

(e) executors or administrators.

The benefit shall be paid to the first named person surviving the Participant, or class with one or more persons surviving the Participant, in the order named, to the exclusion of all subsequently named persons or classes. "Beneficiary" means the person or persons designated by the Participant or by the terms of this

section to receive death benefits, but the provisions of this section shall in no event apply to any amounts payable to a contingent pensioner or other person entitled to payments for life after the death of the Participant under any optional form of benefit.

10.3 <u>Optional methods of settlement of death benefits</u>

Subject to the consent of the Committee, any person (including a beneficiary or contingent pensioner) entitled to receive a benefit after the death of a Participant or former Participant may elect to receive an Actuarial Equivalent of such benefit in any manner other than the manner in which such benefit would otherwise be payable, unless such participant or former participant specifically shall

have provided otherwise. However, in the event that a death benefit described in Section 10.2 must be disposed of other than under a designation of beneficiary executed by the Participant or former Participant, payment of such Actuarial Equivalent may be made on the Committee's initiative with or without the consent of the beneficiary. In this event, payments shall not be subject to any restrictions on mode of settlement previously imposed by the Participant or former Participant. Any action taken pursuant to the provisions of this section shall be subject to the consent of the Trustee.

10.4 Election of pre-retirement death benefit option by certain married Participants. A married Participant may elect, during the election period

described in Section 10.6, the pre-retirement death benefit option which provides for the payment of a monthly pension payable to his spouse upon his death if he dies prior to his normal retirement date while in the employment of the Company after he has satisfied the requirements for early retirement as set forth in Section 5.3, and while such option is in effect.

10.5 Amount, commencement date and form of pre-retirement death benefit

The amount of monthly pension payable to a Participant's surviving spouse under Section 10.4 shall be equal to 50% of the Participant's assumed early retirement pension (that is, the amount of monthly pension the Participant would have received if he had retired and commenced receiving

his pension on the day before the day of his death with the joint and survivor option described in Section 9.2 in effect, and with provision for continuance of 50% of his reduced Pension to his spouse). In computing the Participant's assumed early retirement pension, the reductions called for by Section 10.7 shall be made. Payment of the spouse's pension described in Section 10.4 shall commence to the Participant's spouse on the first day of the month next following the month in which the Participant dies (if said spouse is living on such date) and shall be payable to said spouse on the first day of each following month and shall end on the first day of the month in which said spouse dies.

10.6 <u>Election period of pre-retirement</u>

<u>death benefit and information to be furnished to Participant</u>

The election period during which a married Participant may elect the pre-retirement death benefit option under Section 10.4 is the period beginning one year and 90 days prior to the date on which he as satisfied the service requirement for early retirement as set forth in Section 5.3 and ending on his normal retirement date. The Committee shall, within a reasonable amount of time after the first day of such election period, furnish to the Participant an election form and a written notification, in non-technical terms, of;

(a) The availability of the pre-retirement death benefit option; and

(b) The availability, upon his

request, of a written explanation, in non-technical language, of the terms and conditions of such option and the financial effect upon his estimated pension under the Plan (in terms of dollars per pension payment) of an election of such option or a revocation of such election.

10.7 Effective date of pre-retirement death benefit option

The effective date of the pre-retirement death benefit option election described in Section 10.4 shall be the date designated by the Participant in the election form, but not before the latest of the following dates:

(a) The first anniversary of the date on which he married his

spouse;

(b) The date on which he has completed thirty (30) years of Benefit Accrual Service;

(c) The first anniversary of the date on which he submits the completed election form to the Committee;

However, paragraph (c) above shall not apply if the Participant dies as a result of an accident which occurs after the completed form is returned to the Committee. If the Participant dies before the effective date of an election under Section 10.4, the election will be void and the Participant will be treated as though he had made no election.

10.8 Revocation of pre-retirement death benefit option election

A Participant who has elected the pre-

retirement death benefit option may revoke such election at any time by delivering a written instrument of revocation to the Committee, and such option shall cease to be effective at the end of the day designated by the Participant in the instrument of revocation, but not prior to the date on which he submits such instrument to the Committee. In any event, such option shall cease to be effective on his normal retirement date and shall not be considered to be in effect at any time while the Participant does not have a living spouse. (If the Participant's spouse dies while such option is in effect, and the Participant remarries, such option again becomes effective, unless the Participant revokes it.) No revocation under this Section 10.8

shall prevent the Participant from making a subsequent election under Section 10.4 during the election period described in Section 10.6.

10.9 <u>Pension reduction to reflect cost of pre-retirement death benefit</u>

The amount of pension otherwise payable to or on behalf of a Participant under any provision of the Plan shall be reduced by 1/20 of one percent for each full calendar month that the pre-retirement death benefit option described in Section 10.4 was in effect on his behalf prior to his death and after the calendar month in which the last day before his 60th birthday occurs and 1/50 of one percent for each other full calendar month such option was in effect prior to his death and after the calendar month in-which the last day before his

55th birthday occurs.

ARTICLE XI

CONTRIBUTIONS TO THE TRUST FUND

11.1 Company contributions

All contributions to provide benefits under the Plan shall be made by the Company and no Participant shall be required or permitted to make contributions. The Company's contributions shall be made to the Trust Fund from time to time in amounts actuarially determined to be sufficient to fund the benefits hereunder. The Company, at any time, may reduce, suspend, or discontinue contributions in its sole discretion.

11.2 Application of forfeitures

All forfeitures arising from severance of employment, death, or for any reason shall be applied to reduce Company contributions, and no such

amounts shall in any event be applied to increase the benefits any Employee would otherwise receive under the Plan at any time prior to the termination of the Plan or the complete discontinuance of Company contributions thereunder.

11.3 Erroneous contribution

Notwithstanding any provision of the Plan to the contrary, a contribution made by the Company under the Plan through a mistake of fact may be returned to the Company within one year after such contribution is made.

ARTICLE XII

ADMINISTRATION OF THE PLAN

12.1 Administration

The Company shall, for purposes of ERISA, be the named fiduciary and the administrator of the Plan. A Committee may be appointed by the

Company to assist in the administration of the Plan, however, if such Committee is not appointed or if the Company dissolves the Committee, all powers and duties granted to the Committee by the terms of the Plan shall be exercised by the Company.

12.2 Appointment, removal of Committeeman

The Committee shall consist of at least two persons, but not more than five, and may consist of Participants or Employees or officers of the Company. The Company may remove any Committeeman at any time, with or without cause, by filing written notice of his removal with the Trustee. A Committeeman may resign at any time by filing his written resignation with the Company. A vacancy due to death, removal,

resignation or any other reason shall be filled by the Company. The Company shall notify the Trustee in writing of each Committeeman's appointment.

12.3 Bonding, compensation, expenses

The Committee, and each Committeeman, shall serve without bond or other security and without compensation for services hereunder, except as required by law. All reasonable expenses of the Committee shall be paid out of the Fund except to the extent paid by the Companies, but no Company need pay any such expense.

12.4 Procedure for Committee action

The Committee shall act by agreement of a majority of its members, either by vote at a meeting or in writing without a meeting. In the event of a deadlock or other situation which prevents agreement of a majority of

the Committee, the matter shall be decided by the Company. The Committee, by such action, may authorize one or more Committeemen to execute all instruments or memoranda necessary or appropriate to carry out the actions and decisions of the Committee. The Trustee, upon written notification of such authorization, shall accept and rely upon any such instruments or memoranda until notified in writing that the authorization has been revoked by the Committee. A member of the Committee, who is also a Participant hereunder, shall not vote or act upon any matter relating solely to himself.

12.5 Duties and powers

The Committee shall have all power and authority necessary and appropriate to carry out the provisions of the Plan.

For this purpose, the Committee's powers will include, but will not be limited to, the following authority:

(a) To adopt and enforce such rules and regulations as it deems necessary or proper for the efficient administration of the Plan,

(b) To interpret and apply all terms of the Plan and to correct any defect, supply any omission or reconcile any inconsistency in such a manner as it may deem advisable to carry out the purpose of the Plan;

(c) To authorize the payment of benefits hereunder, and to determine all questions concerning eligibility, status, benefits, and rights of all persons hereunder and all other

questions arising in the administration of the Plan;

(d) To employ or retain such actuaries, attorneys, accountants, physicians, investment advisors, consultants, specialists and other persons or firms as it deems necessary or desirable to advise or assist in the performance of its duties.

All determinations and actions of the Committee shall be final and conclusive on the Company, the Trustee, Participants, Employees, Beneficiaries, joint annuitants, and all other persons.

12.6 Uniformity of rules

The Committee, at all times, in the administration of the Plan and in the interpretation and application of the

provisions of the Plan, shall exercise all powers and authority given it in a non-discriminatory manner, and shall apply uniform administrative rules of general application in order to assure similar treatment to all persons in similar circumstances.

12.7 Records and record keeping

The Committee shall keep a record of its proceedings, acts and decisions, and shall keep all data, records, books of account and instruments pertaining to Plan administration, which shall be subject to inspection or audit by the Company at any time. The Company shall supply all Employee data and other information required by the Committee to administer the Plan, and the Committee may rely upon the accuracy of such information.

12.8 Limitation of liability

No Committeeman shall be liable for any act done or omitted by him, unless due to his own gross negligence or willful misconduct, or for any act done or omitted by any other Committeeman, except as provided by ERISA. The Company shall indemnify and save harmless any Committeeman against all claims, loss, damages, liability, costs and expenses arising out of any act done or omitted (whether by him, the Committee or any other Committeeman), unless due to his gross negligence or willful misconduct.

12.9 Benefit claims procedure

In the event of a claim by any person as to the amount of any distribution or its method of payment, such person shall present the reason for the claim in writing to the Committee. The

Committee, in its discretion, may request a meeting to clarify any matters it deems pertinent. A claimant who is denied a claim will be given written notice by the Committee that describes:

(a) The specific reason or reasons for the denial;

(b) The specific reference to the Plan provision(s) on which the denial is based;

(c) Additional material or information necessary (if any) for the claimant to perfect the claim with an explanation of why the additional information is needed:

(d) The fact that the claimant may request a review of his claim denial by the Committee by filing a written request with

the Committee not more than 60 days after receiving written notice of a denial.

If a review of the initial denial is requested in writing and the claim is again denied, the Committee shall again give written notice to the claimant setting forth items (a) and (b) above. All final interpretations, determinations and decisions of the Committee in respect of any matter hereunder shall be conclusive and binding upon the Company, Participants, Employees, and all other persons claiming interest under the Plan, except as otherwise provided by ERISA.

ARTICLE XIII

MEDIUM OF FUNDING

13.1 Establishment of fund

In order to establish a funding medium

to carry out the provisions of the Plan, the Company shall enter into a Trust Agreement with such person, persons or corporation as Trustee, as the Company may select. Such agreement shall become part of the Plan and shall provide that all contributions hereunder paid to the Trustee shall be held, invested, and reinvested until required to provide benefit payments. The Company reserves the right, in its sole discretion, to change the funding medium at any time. In the event of conflict between the provisions of the Plan and those of the Trust Agreement, the provisions of the Trust Agreement shall prevail.

13.2 Funding policy

A funding policy for the Plan shall be established by the Company which shall

be consistent with the objectives of the Plan and the requirements of Title I of ERISA. The Company shall review the funding policy annually at the end of each Plan Year, and at such other time as it deems necessary. In establishing and reviewing such funding policy, the Company shall endeavor to determine the Plan's short-term and long-term objectives and financial needs, taking into account the need for liquidity to pay benefits and the need for investment growth. All actions of the Company taken pursuant to this Section 13.2 and the reasons therefor shall be recorded and communicated to the Trustee and any investment manager appointed by the Company.

ARTICLE XIV

AMENDMENT AND TERMINATION

14.1 Right to amend

The Company shall have the right, at any time and from time to time, to amend by vote of its board of directors, any or all of the provisions of the Plan without the consent of any person. However, no such amendment shall authorize or permit any part of the Trust Fund to be used for or directed to purposes other than the exclusive benefit of the Participants or their Beneficiares or estates prior to satisfaction of all liabilities under the Plan (except as provided in Section 11.3) nor shall any such amendment affect adversely in any way any vested rights theretofore acquired under the Plan.

14.2 Right to terminate

It is the expectation of the Company that the Plan shall be permanent and

that payment of contributions shall continue indefinitely and regularly as provided herein. However, the Company reserves the right to reduce, suspend, or discontinue its contributions under the Plan at any time or terminate the Plan at any time.

14.3 Provisions upon termination

(a) Upon termination of the Plan, each Participant shall have a fully vested and nonforfeitable interest in his Accrued Benefit to the extent his Accrued Benefit is funded as of the date of such termination. No Employee shall be admitted to participation under the Plan after the Plan is terminated.

(b) Upon termination of the Plan, the assets of the Trust Fund, after payment of any expenses,

taxes or proper charges of the Trustee, shall be allocated among Participants and beneficiaries under the Plan in the order of precedence set forth in Section 4044 (or any replacing section) of ERISA and the regulations promulgated thereunder. If the assets of the Trust Fund available for such allocation are not sufficient to provide in whole the amounts required within the classes as set forth by ERISA, such assets shall be allocated pro rata within the class in which the amounts first cannot be provided in full. Allocation in any of the classes shall be adjusted for any allocation previously made to the same

individual under a prior class. The allocation of assets may be modified by the Internal Revenue Service to meet nondiscrimination requirements.

(c) The assets of the Trust Fund, if any, remaining after the satisfaction of all liabilities under the Plan shall be returned to the Company.

(d) The Committee shall determine whether to disburse the interest of Participants and their Beneficiaries as immediate pension payments, to retain such interest in the Trust Fund and disburse them in the future in accordance with Plan provisions pertaining to pension payments, to purchase non-transferable immediate or deferred annuities

to provide pension payments, or to use such other method the Committee deems advisable in order to furnish whatever pension the Trust Fund resources will provide. The determination of the Committee shall be conclusive and binding on all persons.

(e) In the event of a partial termination of the Plan, each Participant in respect of whom the Plan is terminated shall have a fully vested and nonforfeitable interest in his Accrued Benefit, to the extent his Accrued Benefit is funded as of the date of such partial termination. The extent to which each such Participant's Accrued Benefit is funded as of

such date shall be determined by allocating assets prusuant to the provisions of this Section 14.3 as if the Plan had been terminated on such date as to all Participants. The assets thus allocated to the Participants in respect of whom the Plan is terminated shall be applied for the benefit of such Participants in such manner as the Committee shall determine in accordance with the provisions of this Section 14.3 which describe the methods by which the Committee may provide benefits upon complete termination of the Plan and which shall also apply in the case of partial termination of the Plan.

(f) The provisions of this Section 14.3 shall be subject to the provisions of Article XV and to the rules, regulations, directives or orders of the United States Treasury Department or the Pension Benefit Guaranty Corporation pursuant to authority granted them by ERISA.

(g) For purposes of this Section 14.3, "Participant" means a Participant or a former Participant and a payment in respect of a Participant, such as a payment to his beneficiary, shall have priority as if it were a payment to such Participant. For purposes of this Section 14.3, "beneficiary" means any person (including a

joint annuitant) entitled to receive a benefit hereunder after the death of a Participant.

14.4 Limitation on meaning of termination

An amendment terminating participation of a designated class of Employees shall not be deemed a termination of the Plan with respect to such class, if:

(a) participation of such group on another pension plan toward which the Company contributes is substituted for participation hereunder, and

(b) the Employees in such class consent to the substitution either individually or through a duly recognized collective bargaining agent.

As used in this section, the

expression "another pension plan" shall not include benefits under the Social Security Act or under any other program administered by the United States of America, or any state, district, territory, or subdivision thereof, or by an agency of any of the foregoing.

14.5 Notice to trustee

The Company shall deliver to the Trustee a copy of any vote or instrument amending or terminating this Plan.

ARTICLE XV

SPECIAL PROVISION TO PREVENT DISCRIMINATION

15.1 Restrictions

Notwithstanding any provision of the Plan to the contrary, while the restrictions of this article are applicable, the amount of pension

benefits provided by Company contributions for any Employee who is among the twenty-five highest compensated Employees on the restriction starting date (defined in Section 15.6) and whose anticipated normal annual pension benefit attributable to such contributions is greater than $1500, shall not exceed, in the aggregate, the Actuarial Equivalent of a single sum, due on his restriction calculation date (defined in Section 15.7), equal to the greater of:

(a) If the restriction starting date is the date of an amendment to the plan increasing benefits, the aggregate benefit to which such Employee would have been entitled under the Plan without regard to such amendment;

(b) $20,000;

(c) The sum of (i) 20 percent of the first $50,000 of such Employee's average annual compensation during his last 5 years of employment with the Company multiplied by the number of years between the restriction starting date and his restriction calculation date, plus (ii) if the restriction starting date is the date of an amendment to the Plan increasing benefits, the aggregate benefit to which the Employee would have been entitled under the Plan if the Plan had terminated on the day before such restriction date.

15.2 <u>Period during which restrictions apply</u>

Provided the Plan shall not then have

been terminated, the restrictions set forth in this article shall remain applicable until the first date, on or after the tenth anniversary of the restriction starting date on which the full current costs are funded, and thereafter shall cease to apply. If the Plan shall be terminated prior to such date, the restrictions of this article shall remain applicable indefinitely.

15.3 Exception to restrictions

During any period when the full current costs of the Plan have been met, and provided the Plan shall not have been terminated, the restrictions of this article shall not prevent the payment of any pension benefits on behalf of an Employee who dies, nor the payment of any pension benefit withheld for a prior year pursuant to

such restrictions, nor the payment to any Employee of:

(a) his full accrued monthly retirement benefit commencing on his normal retirement date; or

(b) an Actuarial Equivalent of such benefit which provides for monthly payments not greater than those payable under paragraph (a) above; or

(c) an Actuarial Equivalent of such benefit payable in a lump sum upon his termination of employment with the Company.

However, if a lump sum distribution exceeds the amount payable under the provisions of Section 15.1, such distribution shall be made under a special agreement between the Trustee and the Employee. The agreement shall provide for immediate repayment of the

excess amount, with interest, by the employee (or his estate) if the Plan is terminated or the full current costs are not met any time during the period on which the restrictions of this article are applicable. The agreement shall include provisions for securing the obligation of the Employee by the deposit of property with a suitable depository.

15.4 Reallocation of resources

In the event of the complete discontinuance of Company contributions or termination of the Plan, the amount of any reduction in allocation to an Employee necessary to comply with the restrictions of this article shall be reallocated among Employees not affected by this article and such reallocation shall be made in accordance with the provisions of

Section 14.3. Any assets remaining after full provision is made for all liabilities under the Plan for Employees not affected by this article shall be reallocated among Employees whose benefits are restricted by this Section, and such reallocation shall be made in accordance with the provisions of Section 14.3.

15.5 Full current cost defined

For the purpose of this article, the term "full current costs" means the normal cost for all years since the effective date of the Plan, plus interest on any unfunded liability during such periods.

15.6 Restriction starting date defined

"Restriction starting date" shall mean the effective date of the Plan and the effective date of any amendment to the Plan substantially increasing benefits

under the Plan.

15.7 Restriction calculation date defined

"Restriction calculation date" shall mean, for any Employee at any time, the earliest of (i) the date of termination of the Plan (ii) the date of failure to meet full current costs and (iii) the date his pension benefit under the Plan becomes payable. It is provided, however, that in the event full current costs again become funded, following a failure to so fund, then such failure shall be disregarded in subsequent determinations.

15.8 Adjustment upon termination of restricted period

As of the date on which the restrictions of this article cease to apply, each distributee for whom any benefit payment was reduced or omitted

on account of such restrictions (or, in the case of his death, his estate) shall become entitled to a single sum equal to the amount of each such reduction, or omission, with interest (such interest shall be compounded annually at the rate in use during the period of reference for preparing actuarial valuations of Plan costs). Thereafter, any benefits remaining to be paid shall not be affected by the restrictions of this article.

15.9 Restrictions to cease when not required by regulations

The restrictions of this article are included in the Plan to conform to the requirements of Section 1.401-4(c) of the Treasury Regulations (or any substitute therefor) and shall cease to be effective at such time as the provisions of Section 1.401-4(c) of

the Treasury Regulations (or any substitute therefor) are no longer effective or applicable.

ARTICLE XVI

MISCELLANEOUS PROVISIONS

16.1 Spendthrift provisions

No benefit, right or interest of any person hereunder shall be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, seizure, attachment or other legal, equitable or other process, or liable for, or subject to the debts, liabilities or other obligations of such person.

16.2 Incompetency of benefit recipient

If the Board deems any benefit recipient incapable of receiving benefit payments by reason of minority, illness, infirmity or other incapacity, it may direct that such

payments by (sic) applied directly for the benefit of such benefit recipient, or it may direct that such payments be made to a person selected by the Committee to disburse them for the benefit of such benefit recipient, and the receipt of such person for any such payment shall be a complete acquittance therefor. Any such payment, to the extent thereof, shall discharge the liability of the Trust Fund for payment of benefit payments to such benefit.

16.3 Limitation on rights and benefits

Nothing appearing in or done pursuant to the Plan shall be held or construed:

(a) to give any person any legal or equitable right or interest in the Trust Fund or any part thereof or distribution

therefrom, or against the Company, except as expressly provided herein or as provided by ERISA.

(b) to create a contract of employment with any Employee, to obligate the Company to continue the services of any Employee, or to affect or modify his terms of employment in any way;

(c) to allow either service as a sole proprietor or a partner or compensation therefor to be taken into account for any purpose hereunder.

16.4 Benefits subject to adequacy of Trust Fund

The Company does not guarantee the payment of benefits hereunder, and all persons shall look soley to the Trust Fund for any payments under the Plan,

and such payments shall be made only to the extent that the Trust Fund is sufficient therefor, except as may be otherwise provided by ERISA.

16.5 Trust Fund for exclusive benefit of Employees

Notwithstanding any other contrary provision of the Plan or the Trust Agreement, no part of the Trust Fund shall revert to the Company, except as provided in Sections 11.3 and 14.3 and no part of the Trust Fund, other than such part as is required to pay taxes, if any, or administration expenses chargeable against the Trust Fund, shall be used for any purpose other than the exclusive benefit of Employees of the Company or their Beneficiaries, pursuant to the provisions of the Plan.

16.6 Plan mergers

In the case of any merger or consolidation of this Plan with, or transfer of assets or liabilities of this Plan to, any other Plan, the benefit of each Participant of this Plan shall be as great if such other plan were to terminate immediately after such merger, consolidation or transfer as it would have been if this Plan had terminated immediately before such merger, consolidation or transfer.

16.7 Latest commencement of benefits

Notwithstanding any other provision of the Plan to the contrary, the distribution of any benefit payable hereunder to a Participant shall begin no later than 60 days after the later of:

(a) the close of the Plan Year in which the Participant attains

age 65; or

(b) the 10th anniversary of the close of the Plan Year in which the Participant commenced participation in the Plan, or

(c) the close of the Plan Year in which the Participant ceased to be in the employ of the Company or an Affiliated Company.

16.8 State of jurisdiction

The provisions of this Plan shall be construed, enforced and administered according to the laws of the State of Virginia, subject, however, to the provisions of ERISA.

C E R T I F I C A T E

This is to certify that the attached copy of the Coleman Furniture Corporation Pension Plan as amended and restated December 1, 1984, is a true and complete copy of the original document.

/s/ Roy V. Creasy 11/24/87
Roy V. Creasy, (date)
Plan Administrator

STATE OF VIRIGNIA)
) to-wit:
CITY OF ROANOKE)

The foregoing Certificate was subscribed and acknowledged before me this /s/ 24th day of /s/ November, 1987, by Roy V. Creasy.

/s/ Zella M. Field
Notary Public

My Commission expires:

April 16, 1991

COLEMAN FURNITURE CORPORATION PENSION PLAN

Effective date
December 1,1963

As Amended and Restated
December 1, 1984

TABLE OF CONTENTS

INTRODUCTION

The Coleman Furniture Corporation Pension Plan became effective September 1, 1963, and was subsequently amended with the most recent amendment and restatement being effective December 1, 1976.

Effective July 19, 1984, the Plan was terminated and all participants were fully vested; however, the Plan shall recognize that a partial termination occurred on October 30, 1981.

The amended and restated Retirement Plan herein contained constitutes an amendment, effective December 1, 1984, to the earlier Plan provisions rather than a restatement of such Plan. The Plan

provisions in effect immediately prior to this December 1, 1984 amendment shall remain in effect for those Participants who are not actively employed by the Employer at any time after December 1, 1984, except that the following sections of this amended and restatement Retirement Plan shall apply to those Participants: Sections 1.02, 4.04, 4.05, 4.06, 5.05, 6.02, the seventh and ninth paragraphs of 6.04, 8.04, 9.02, Article XI, and Section 12.11.

Effective December 1, 1984, the Plan as amended and restated has the terms and provisions hereinafter set forth.

Revised 12/8/86

ARTICLE I

DEFINITIONS

As used herein and in the concomitant Trust Agreement, unless otherwise required by the context, the following words and

phrases shall have the meanings indicated:

1.01 Accrued Benefit means, for any Participant, as of any date, the monthly retirement benefit determined in accordance with Section 4.01 with Final Average Compensation and Benefit Accrual Service as of the date of reference, and Primary Social Security Benefit determined as the Primary Social Security Benefit that would be applicable at the Participant's attainment of age sixty-five (65) assuming (a) no change in the Federal Social Security Act between the first day of the Plan Year of such determination and the Participant's attainment of age sixty-five (65) and (b) the Participant would continue to receive until age sixty-five (65) earnings which would be treated as wages for the purposes of the Federal

Social Security Act at the same rate as he was receiving at such determination date. It is provided, however, that such Accrued Benefit shall not exceed the greater of:

1.01(a) One dollar and twenty-five cents ($1.25) multiplied by the total amount of his Benefit Accrual Service at the date of reference, not to exceed twenty (20) years; or

1.01(b) The monthly retirement benefit to which he would be entitled commencing at his Normal Retirement Date determined under the normal retirement benefit formula (based upon his Final Average Compensation and Primary Social Security

Benefit as of the date of reference, but based upon the total amount of Benefit Accrual Service which he would have at his Normal Retirement Date if he should continue to accrue Benefit Accrual Service from the date of reference to his Normal Retirement Date) multiplied by a fraction, the numerator of which is the total amount of his Benefit Accrual Service at the date of reference and the denominator of which is the total amount of Benefit Accrual Service which he would have at his Normal Retirement Date if he

should continue to accrue Benefit Accrual Service from the date of reference to his Normal Retirement Date.

1.02 Actuarial Equivalent means a benefit of equivalent value when computed on the basis of interest and mortality tables adopted by the Corporation for use in the computation of actuarial equivalents under the Plan. Such Actuarial Equivalent shall be reflected hereunder by the application of the factors denoted in the Appendix to this Plan.

1.03 Affiliate means a corporation which is a member of the same controlled group of corporations [as defined in IRC Sections 414(b), (c) and (m)] as the Employer but which is not an Employer.

1.04 Bankruptcy Trustee means Roy V. Creasy

or such other person or persons authorized by the bankruptcy court to administer the Plan.

1.05 Beneficiary means any person designated by a Participant or otherwise entitled to receive such benefits as may become payable under the provisions of the Plan after the death of such Participant.

1.06 Benefit Accrual Service means as of any date the sum of past service, if any, under Section 1.06(a) and future service under Section 1.06(b), subject to Section 1.06(c) below, if applicable.

1.06(a) If the Employee was employed by the Employer on December 1, 1976, and a participant of the prior plan, he shall receive credit for past service.

Past service shall mean the number of years and completed months of continuous employment by the Employer of an Employee from his most recent hiring date prior to December 1, 1976, until November 30, 1976.

1.06(b) Future service shall be the total number of Plan Years during which the Employee has at least one thousand (1,000) Hours of Service for the Employer during the period of time commencing on the later of (i) December 1, 1976; or (ii) if Section 1.06(c) is applicable, the first day of a Plan Year coincident

with or immediately preceding the applicable reemployment date.

1.06(c) Notwithstanding the above, if a terminated Participant is subsequently reemployed and again becomes a Participant, his Benefit Accrual Service shall not include any periods of employment prior to reemployment if his consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (i) five (5) consecutive One Year Breaks in Service or (ii) the Participant's Benefit Accrual Service as of his termination date and

his vested benefit pursuant to Section 6.04 was zero at date of termination. However, the provisions of Section 1.06(c)(i) shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

1.06(d) In the case of an Employee who first become a Participant in the Plan on December 1, 1976, and who, on such date, does not satisfy the eligibility requirements of the Plan as in effect on November 30, 1976, any Beneficiary Accrual Service before

December 1, 1976, shall be disregarded.

1.06(e) Any Benefit Accrual Service after the Employee's Normal Retirement Date shall be excluded.

1.07 Board means the board of directors of the Corporation.

1.08 Compensation means, for any Employee, the total earnings, prior to withholding, paid to him by the Employer as evidenced on Internal Revenue Service Form W-2 or on a similar government reporting form, including overtime payments, bonuses and commissions but excluding any contributions by the Employer to this or any other employee benefit program. Compensation of an Employee who is at any time simultaneously in the employ of more than one Employer shall be the

sum of such earnings received by the Employee from all such Employers.

1.09 Contributions means the payments as provided herein by the Employer to the Fund.

1.10 Corporation means Coleman Furniture Corporation, a Virginia corporation, or any successor thereto. The Corporation is the sponsor, plan administrator and named Fiduciary as it relates to the employees of each Employer.

1.11 Credited Service means as of any date the sum of past service, if any, under Section 1.11(a) subject to Section 1.11(b) below, if applicable.

1.11(a) Any year of Credited Service before December 1, 1976, shall be disregarded if such year of Credited Service would have been

disregarded under the rules of the Plan with regard to breaks in service and length of service in effect from time to time before such date;

1.11(b) Notwithstanding the above, if a terminated Participant is subsequently reemployed and again becomes a Participant, his Credited Service shall not include any periods of employment prior to reemployment if his consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (i) five (5) consecutive One Year Breaks in Service or (ii) the Participant's

Credited Service as of his termination date and his vested benefit pursuant to Section 6.04 was zero at date of termination. However, the provisions of Section 1.11(c)(i) shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

For purposes of determining the vesting percentage in Section 6.04:

1.11(c) Periods of employment with an Affiliate which would have constituted a Plan Year of Service had the Participant been employed by the Employer shall be

included as if such periods had been performed for the Employer; and

1.11(d) Effective for periods prior to December 1, 1985, any Credited Service prior to the Plan Year in which the Participant attains the age of twenty-two (22) shall be excluded. Effective for periods commencing on and after December 1, 1985, any Credited Service prior to the Plan Year in which the Participant attains the age of eighteen (18) shall be excluded. In no event, however, shall this provision opoerate to decrease any Credited Service for vesting

purposes prior to such date.

1.12 Defined Benefit Plan means a plan established and qualified under IRC Section 401 or 403, except to the extent it is, or is treated as, a Defined Contribution Plan.

1.13 Defined Contribution Plan means a plan which is established and qualified under IRC Section 401 or 403, which provides for an individual account for each Participant therein and for benefits based solely on the amount contributed to each Participant's account and any income and expenses or gains or losses (both realized and unrealized) which may be allocated to such accounts.

1.14 Effective Date means December 1, 1963, or such later date as of which an Employer shall have adopted the Plan

for its Employees.

1.15 <u>Employee</u> means any person employed by the Employer and any person considered a leased employee within the definition of IRC Section 414(n) other than a person who is represented by a collective bargaining unit for the purpose of bargaining with the Employer with respect to wages, hours of employment or other conditions of employment unless the resulting bargaining agreement provides for participation in the Plan. In the event a leased employee is entitled to a benefit hereunder, such benefit shall be reduced by the Actuarial Equivalent of any benefit said leased employee receives from any qualified plan sponsored by the leasing organization.

1.16 <u>Employer</u> means, collectively or

individually as the context may indicate, the Corporation and any other corporation which (a) is a member of the same controlled group of corporations as the Corporation as determined pursuant to IRC Sections 414(b), (c) and (m), (b) the Board shall have authorized to adopt the Plan, and (c) by action of its own board of directors shall have adopted the Plan and become signatory to the Trust Agreement; or any successor to one or more of such entities.

1.17 <u>ERISA or Act</u> means the Employee Retirement Income Security Act of 1974.

1.18 <u>Fiduciary</u> means the Corporation, the Employer, the Trustee, the Plan Administrator and any individual, corporation, firm or other entity which assumes in accordance with

Article VIII responsibilites of the Corporation, the Employer, the Trustee or the Plan Administrator respecting management of the Plan or the disposition of its assets.

1.19 <u>Final Average Compensation</u> means, for any Employee as of any date, his Compensation averaged over the most recent one hundred twenty (120) months of participation in the Plan before his Normal Retirement Date and through his computation date. However, if his Final Average Compensation is to be determined as of any computation date when he has completed fewer than one hundred twenty (120) months of participation in the Plan before his Normal Retirement Date, his Final Average Compensation shall be his Compensation averaged over the most recent one hundred twenty (120) months

(or if shorter, the entire period) of his employment with the Corporation before his Normal Retirement Date and through his computation date (whether or not such employment was rendered as a Participant). Notwithstanding anything herein to the contrary, the Final Average Compensation during any period subsequent to the date a Participant is first eligible for early retirement shall never be less than a Participant's Final Average Compensation as of any date commencing after such date and ending on his Normal Retirement Date.

In the event an Employee's service is disregarded pursuant to Sections 1.06 and 1.11 for purposes of determining Final Average Compensation, such service shall be disregarded.

1.20 <u>Fund</u> means the trust fund created in accordance with Article VII hereof.

1.21 <u>Hours of Service</u> means the sum of:

1.21(a) Each hour for which an employee is paid, or entitled to payment for the performance of duties for the Employer during the applicable computation period.

1.21(b) Each hour for which an employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, or leave of absence. However, the determination of hours under this Section 1.21(b) shall be subject to the following restrictions:

1.21(b)(i) No more than five hundred one (501) hours shall be credited to an employee during any single continuous period during which the employee performs no duties (whether or not such period occurs in a single computation period).

1.21(b)(ii) No such hours shall be credited to an employee if payment is made or due under a plan maintained soley for the purpose of complying with applicable

workers' compensation or unemployment compensation or disability insurance laws.

1.21(b)(iii) Hours shall not be credited for a payment which solely reimburses an employee for medical or medically related expenses incurred by the employee.

1.21(c) Each hour during which an employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed due to military duty and any other periods in which an employee was not paid or entitled to payment and would presumably have

performed services for the Employer but for the fact that such individual was on a military leave of absence for service in the armed forces of the United States of America, provided the individual entered such service directly from the employ of the Employer, was discharged from such service and was reemployed by the Employer within the period during which his employment rights as a veteran are protected by law.

1.21(d) Each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to

by the Employer provided, however, that the same hours shall not be credited both under Section 1.21(a), Section 1.21(b) or Section 1.21(c) above, as the case may be, and under this Section 1.21(d).

Hours of Service shall not include any period during which the Employee was employed by a predecessor of the Employer, unless the predecessor's organization maintained the Plan or a predecessor plan.

Hours of Service under Section 1.21(a), Section 1.21(c) and Section 1.21(d) above shall be determined from the Employer records. Hours of Service under Section 1.21(b) above shall be determined in accordance with Department of Labor Regulations

2530.200b-2. Hours of Service hereunder shall be credited to the appropriate computation period in accordance with Department of Labor Regulation 2530.200b-2(c). Notwithstanding anything herein to the contrary, nothing in this Sectin 1.21 shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States or any rule or regulation issued under any such law.

1.22 IRC or Code means the Internal Revenue Code of 1954, as amended from time to time. Any reference to any section of the IRC shall be deemed to include any applicable regulations and rulings pertaining to such section and shall also be deemed a reference to comparable provisions of future laws.

1.23 Key Employee means any person, former

employee or the beneficiary of a former employee in an Employer plan who at any time during the Plan Year or any of the four (4) preceding Plan Years is:

1.21(a) an officer of the Employer having an annual compensation greater than one hundred fifty percent (150%) of the amount in effect under IRC Section 415(c)(1)(A) for any such Plan Year;

1.23(b) one (1) of the ten (10) employees having annual compensation from the Employer of more than the limitation in effect under IRC Section 415(c)(1)(A) and owning (or considered as owning within the

meaning of IRC Section 318) more than a one-half percent (½%) interest and the largest interest in the Employer;

1.23(c) a five percent (5%) owner of the Employer; or

1.23(d) a one percent (1%) owner of the Employer having an annual compensation from the Employer of more than one hundred fifty thousand dollars ($150,000).

With respect to Section 1.23(b) above, if two (2) Employees have the same interest in the Employer, the Employee having the greater annual compensation from the Employer shall be treated as having a larger interest.

The term "non-Key Employee" shall

mean an employee who is not a Key Employee.

For purposes of this Section 1.23, "compensation" shall have the same meaning as in Section 4.07(b).

This definition shall be interpreted consistent with IRC Section 416 and rules and regulations issued thereunder. Further, such law and regulations shall be controlling in all determinations under this definition, inclusive of any provisions and requirements stated thereunder but hereinabove absent.

1.24 Limitation Year means the twelve (12) month period commencing on December 1 and ending on November 30.

1.25 Normal Retirement Age means the date a Participant attains the age of sixty-five (65).

1.26 One Year Break in Service means a Plan

Year during which the Employee has not completed more than five hundred (500) Hours of Service.

For periods commencing on or after December 1, 1985, and to the extent not already credited, Hours of Service shall be credited solely for purposes of determining whether a One Year Break in Service has occurred with respect to an Employee who is absent from work regardless of whether the Employee is paid for such absence:

1.26(a) By reason of the pregnancy of the Employee,

1.26(b) By reason of the birth of a child of the Employee,

1.26(c) By reason of the placement of a child with the Employee in connection with the adoption of such child by such Employee, or

1.26(d) For purposes of caring for such child for a period beginning immediately following such birth or placement.

Hours of Service to be credited for such purpose shall be:

(i) the Hours of Service which otherwise would normally have been credited to such Employee but for such absence, or

(ii) in any case in which the Plan Administrator is unable to determine the hours in (i) above, eight (8) Hours of Service per normal workday of absence,

except that the total number of hours treated as Hours of Service by reason of any such pregnancy or placement shall not exceed five hundred one

(501) hours. The hours in items (i) and (ii) above shall be treated as Hours of Service hereunder:

(iii) only in the Plan Year in which the absence from work begins, if an Employee would be prevented from incurring a One Year Break in Service in such Plan Year solely because the period of absence is treated as Hours of Service as provided in Section 1.26(a), Section 1.26(b), Section 1.26(c) or Section 1.26(d) above; or

(iv) in any other case, in the immediately following Plan Year.

Further, the Plan Administrator may request that the Employee furnish any information the Plan Administrator may require to establish that the absence is for the reasons

hereinbefore provided and the number of days for which there was such an absence. In the event such information is not submitted in a timely manner, no Hours of Service shall be credited pursuant to this paragraph.

1.27 Participant means any Employee who becomes a Participant as provided in Article II hereof.

1.28 Plan means the Coleman Furniture Corporation Pension Plan, as contained herein or as duly amended.

1.29 Plan Administrator means the administrator of the Plan provided for in Article VIII hereof.

1.30 Plan Year means each twelve (12) month period beginning on December 1 and ending on November 30.

1.31 Primary Social Security Benefit means, for any Participant as of any date,

the annual income to which the Participant is entitled under the provisions of the Federal Social Security Act as in effect on the first day of the Plan Year of determination without reflecting any reduction therein for the commencement of benefits on or after the attainment of age sixty-five (65) and the date the Participant would be eligible for benefits. If a Participant does not qualify for, or loses, Social Security benefits to which he is entitled under the Federal Social Security Act because of failure to make application therefor, or entering into covered employment, such Social Security benefits shall nevertheless be considered, for purposes of the Plan, as being received by such Participant. The Primary Social Security Benefit

with respect to any Participant shall be established by the Plan Administrator on the basis of such evidence as may be available to it and reasonable assumptions based thereon pursuant to the following.

In lieu of calculating the Primary Social Security Benefit using the Participant's actual wage history, the Plan Administrator may estimate such amount provided the following rules are met:

1.31(a) The Participant's wage history may be estimated for a portion or all periods prior to the date of determination provided that the rate used for such retrospective projection is either (i) the actual change in the average wages

from year to year as determined by the Social Security Administration or (ii) six percent (6%) per annum.

1.31(b) In the event an estimated Primary Social Security Benefit is used in the calculation of a Participant's benefit hereunder, such Participant shall receive written notice to that effect. Further, the notice shall inform the Participant of his right to supply his actual salary history to the Plan Administrator and of the financial consequences of not supplying such history.

The notice shall also inform the Participant that his actual salary history can be obtained from the Social Security Administration.

This notice must be distributed to Participants each time the summary plan description is provided as well as upon separation from service.

1.31(c) In the event the Participant supplies documentation of his salary history within a reasonable period of time following the later of the date he separates from service (by retirement or otherwise) and the time when the

Participant is notified of the benefit to which he is entitled, the Participant's benefit will be adjusted retroactively to its commencement date to reflect actual salary history for periods previously estimated subject to the following:

(i) A period of twelve (12) months from the appointed date shall be deemed reasonable for purposes of this Section 1.31(c); and

(ii) The adjustment effectuated hereunder could have the effect of increasing as well as decreasing a Participant's monthly retirement benefit.

Sections 1.31(b) and 1.31(c) above shall only apply with respect to any Employee employed during any Plan Year beginning after December 31, 1983. Further, the application of this Section 1.31 shall be made by the Plan Administrator in a uniform and nondiscriminatory manner.

1.32 Spouse means the person to whom the Participant is legally married.

1.33 Top Heavy Plan generally means, on or after January 1, 1984, any plan under which, as of any determination date the present value of the cumulative accrued benefits under the plan for Key Employees exceeds sixty percent (60%) of the present value of the cumulative accrued benefits under the plan for all Employees.

For purposes of this definition:

1.33(a) If such a plan is a Defined

Benefit Plan, the present value of cumulative accrued benefits shall be the lump sum present value determined pursuant to Article XI. If such plan is a Defined Contribution Plan, the present value of cumulative accrued benefits shall be deemed to be the market value of all Employee accounts under the plan. Notwithstanding the above, for purposes of determining the present value of the accrued benefits, distributions made within a five (5) year period ending on the determination date must be included.

1.33(b) A plan shall be considered a Top Heavy Plan for any Plan Year if, on the last day of the preceding Plan Year, the above rules were met. For the first Plan Year that the Plan shall be in effect the determination of whether said Plan is a Top Heavy Plan shall be made as of the last day of such Plan Year. Any such determination shall be based on the valuation date falling within that Plan Year. For this purpose, the valuation date must be the same valuation date used for computing Plan costs for minimum funding regardless of whether a

valuation is performed that year.

1.33(c) Each plan of the Employer required to be included in an "aggregation group" shall be treated as a Top Heavy Plan if such group is a top heavy group.

1.33(d) The term "aggregation group" means

(i) each plan of the Employer in which a Key Employee is a Participant and

(ii) each other plan of the Employer which enables any plan in (i) to meet the requirements of IRC Section 401(a)(4) or 410.

A permissive aggregation group consists of plans of the Employer that are required to be

aggregated, plus one (1) or more plans of the Employer that are not part of a required aggregation group but that satisfy the requirements of IRC Sections 401(a)(4) and 410 when considered together with the required aggregation group.

1.33(e) If any individual has not received any compensation from any Employer (other than benefits under the Plan) at any time during the five (5) year period ending on the determination date, any accrued benefit for such individual shall not be taken into account in the testing procedure herein described.

1.33(f) This definition shall be

interpreted consistent with IRC Section 416 and rules and regulations issued thereunder. Further, such law and regulations shall be controlling in all determinations under this definition inclusive of any provisions and requirements stated thereunder but hereinabove absent.

1.34 Trust Agreement means the agreement entered into between the Employer and the Trustee pursuant to Article VII hereof.

1.35 Trustee means such individual, individuals or financial institution, or a combination of them as shall be designated in the Trust Areement to hold in trust the assets of the Plan, and shall include any successor

Trustee to the Trustee initially designated thereunder.

1.36 Year of Service means for any Employee, a stated twelve (12) consecutive month period during which such Employee completed one thousand (1,000) or more Hours of Service as an Employee.

In the event an Employee is simultaneously in the employ of more than one Employer or is transferred from the employment of one Employer to the employment of another Employer, the number of Hours of Service completed during any twelve (12) consecutive month period shall be the sum of the number of Hours of Service completed for all Employers during such period. For purposes of determining participation in Article II:

1.36(a) Periods of employment with an Affiliate which would have constitued a Year of Service had the Employee been employed by the Employer shall be included as if such periods had been performed for the Employer; and

1.36(b) Periods of employment with the Employer other than as an Employee which would have constituted a Year of Service had the Employee been employed as an Employee shall be included as if such periods had been performed as an Employee.

ARTICLE II

PARTICIPATION

2.01 Eligibility - Each person who was a

Participant on November 30, 1984, subject to the provisions hereinafter contained, shall continue as a Participant after such date.

Each person who was not a Participant on November 30, 1984, and each person who becomes an Employee after such date and who is not already a Participant shall automatically become a Participant on the first day of the month coinciding with or next following the latest of (a) the Effective Date, (b) the attainment of age twenty-five (25), and (c) the completion of a Year of Service subsequent to the date on which he completed his first Hour of Service. Notwithstanding anything contained herein to the contrary, effective December 1, 1985, the age twenty-five (25) requirement hereinbefore provided

shall be reduced to age twenty-one (21).

Upon the completion of the first twelve (12) month period noted in (c) above, the twelve (12) month period for determining the Year of Service shall be based on Plan Years starting with the Plan Year in which occurs the first anniversary of the date on which he completed the applicable first Hour of Service.

2.02 <u>Participation</u> - Each person who becomes a Participant shall remain a Participant so long as he remains an Employee, or is entitled to future benefits under the terms of the Plan.

In the event an Employee terminates his employment prior to satisfying the Year of Service requirement and is subsequently reemployed as an Employee, his Years

of Service shall not include any periods of employment prior to reemployment if the Employee's consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (1) five (5) consecutive One Year Breaks in Service or (ii) the Employee's Years of Service as of his termination date. However, the provisions of item (i) above shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

If a terminated Employee is reemployed after incurring a One Year Break in Service and such Employee was entitled to a vested benefit under Section 6.04 at time of termination of employment or if a terminated Employee

is reemployed at a time which requires retention of his prior Years of Service, then such Employee shall become a Participant on his reemployment date.

2.03 Designation of Beneficiary - Each Participant, on or before becoming entitled to death benefits hereunder, shall designate a Beneficiary on forms furnished by the Plan Administrator, and such forms shall be maintained in files held by the Plan Administrator. The Participant may from time to time change the Beneficiary by written notice to the Plan Administrator and upon such change the rights of all previously designated Beneficiaries to receive any benefits under the Plan shall cease. If at the date of death of the Participant, there is no valid and current Beneficiary designation on

file with the Plan Administrator, then any death benefits which would have been payable to the Beneficiary shall be payable to the Participant's surviving Spouse, if any; if none, to the Participant's children who survive him, equally; or if none survive, then to the Participant's estate. The interpretation of the Plan Administrator with respect to any Beneficiary designation, subject to applicable law, shall be binding and conclusive upon all parties and no person who claims to be a Beneficiary, or any other person, shall have the right to question any action of the Plan Administrator, which in the judgment of the Plan Administrator fulfills the intent of the Participant who filed such designation.

If a Beneficiary designated by a

Participant is not the Participant's Spouse, then the Spouse's consent shall be required for such designation to become effective, and such consent shall be witnessed by a representative of the Plan Administrator or a notary public. The Plan Administrator may accept an election other than that provided hereunder without the consent of the Spouse if there is no Spouse, the Spouse cannot be located, or such other circumstances as may be prescribed by regulations. Any spousal consent shall only be applicable to the Spouse granting such consent.

ARTICLE III

RETIREMENT DATES

3.01 Normal Retirement Date - The Normal Retirement Date of a Participant shall be the first day of the month

coinciding with or next following the later of (i) the date on which the Participant attains his Normal Retirement Age and (ii) the tenth (10th) anniversary of the date he commenced his employment with the Corporation. A Participant reaching his Normal Retirement Date while an Employee may at that date retire from the employment of the Employer; otherwise the provisions of Section 3.02 shall be applicable.

3.02 Delayed Retirement Date - A Participant who remains in the active employ of the Employer after his Normal Retirement Date shall retire on his Delayed Retirement Date. The Delayed Retirement Date of a Participant who continues his employment with the Employer beyond his Normal Retirement Date shall be

the first day of the month coinciding with or next following the actual date the Participant severs his employment with the Employer.

3.03 Early Retirement Date - A Participant may retire from the employment of the Employer on the first day of any month prior to his Normal Retirement Date, provided he has completed at least thirty (30) years of Benefit Accrual Service.

ARTICLE IV

RETIREMENT BENEFITS

4.01 Normal Retirement Benefit - A Participant, upon retirement at his Normal Retirement Date, shall receive a monthly retirement benefit which shall commence on such retirement date and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be the larger

of Section 4.01(a) or Section 4.01(b).

401(a) One-Twelfth (1/12) of the excess of Section 4.01(a)(i) over Section 4.01(a)(ii) following:

4.01(a)(i) Fifty percent (50%) of the Participant's Final Average Compensation;

4.01(a)(ii) Eighty-three and one-third percent (83 1/3%) of the Participant's Primary Social Security Benefit,

such amount reduced one-twentieth (1/20) for each year (recognizing a fraction of a year) of Benefit Accrual Service less than twenty (20).

4.01(b) The lesser of 4.01(b)(i) and 4.01(b)(ii) following:

4.01(b)(i) Twenty-Five dollars ($25.00); or

4.01(b)(ii) One Dollar and twenty-five cents ($1.25)

multiplied by the total number of years of Benefit Accrual Service (recognizing a fraction of a year).

4.02 <u>Delayed Retirement Benefit</u> - A Participant, upon retirement at his Delayed Retirement Date in accordance with Section 3.02, shall receive a monthly retirement benefit which shall commence on the date of such retirement and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be the larger of Section 4.02(a) or Section 4.02(b).

4.02(a) One-twelfth (1/12) of he excess of Section 4.02(a)(i) over Section 4.02(a)(ii) following:

4.02(a)(i) Fifty percent (50%) of the Participant's Final Average Compensation acturially

increased to reflect the later commencement of his benefit payments;

4.02(a)(ii) Eighty-three and one-third (83 1/3%) of the Participant's Primary Social Security Benefit, determined as of his actual retirement date,

such amount reduced one-twentieth (1/20) for each year (recognizing a fraction of a year) of Benefit Accrual Service less than twenty (20).

4.02(b) The lesser of 4.02(b)(i) and 4.02(b)(ii) following:

4.02(b)(i) Twenty-five dollars ($25.00) actuarially increased to reflect the later commencement of his of his benefit payments; or

4.02(b)(ii) One Dollar and twenty-five cents ($1.25)

multiplied by the total number of years of Benefit Accrual Service (recognizing a fraction of a year), actuarially increased to reflect the later commencement of his benefit payments.

4.03 Early Retirement Benefit - A Participant, upon retirement at his Early Retirement Date in accordance with Section 3.03, shall receive a monthly retirement benefit which shall commence on such retirement date and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be determined as the Participant's Accrued Benefit as of his Early Retirement Date. Notwithstanding anything herein to the contrary, a Participant who retires in

accordance with Section 3.03 shall (a) have the right, at any time prior to his Early Retirement Date to elect to receive his early retirement benefit commencing on his Normal Retirement Date and (b) if deferred benefit commencement is elected under (a), have the right, at any time subsequent to his Early Retirement Date but prior to his Normal Retirement Date, to request that the benefit commencement date be at some earlier date. If such early retirement benefit commences before his Normal Retirement Date, the monthly amount of such retirement benefit shall be the Actuarial Equivalent of his Accrued Benefit computed as of his benefit commencement date.

4.04 <u>Reemployment of Retired Participants</u> - If a Participant is reemployed as an

Employee after the commencement of a retirement benefit pursuant to his retirement under the provisions of Sections 3.03 or Section 6.04 but prior to his attainment of the age of sixty-five (65), his retirement benefit shall be discontinued. The Participant's rights to future benefits under the Plan shall be subject to redetermination upon any subsequent termination of employment or retirement under the Plan in accordance with the Plan provisions then in effect. Any benefits thereafter payable shall be reduced on an Actuarial Equivalent basis to reflect the value of the retirement benefit payments received by the Participant in the period during which he was in receipt of a retirement benefit.

Notwithstanding the above paragraph, the monthly retirement benefit thereafter payable shall not be less than the monthly retirement benefit payable immediately before his latest reemployment plus the Actuarial Equivalent of any monthly retirement benefit suspended while the Participant is not employed in such service as is described in Department of Labor Regulations 2530.203-3(c)(1).

If a Participant is reemployed as an Employee after the commencement of a retirement benefit under any of the provisions of the Plan and after the attainment of the age of sixty-five (65), he shall continue to receive the retirement benefit determined and paid in every respect as if he were not so employed by the Employer, and such Participant shall not be entitled to

any additional retirement benefit upon his subsequent termination of employment.

4.05 Maximum Retirement Benefit - Anything herein to the contrary notwithstanding, effective for Plan Years commencing on and after January 1, 1983, the monthly retirement benefit payable in the form of a straight life annuity from the Plan on behalf of a Participant, when combined with any benefits from another qualified Defined Benefit Plan maintained by the Employer, shall not exceed the amount as provided in the following paragraphs of this Section 4.05. If the normal form of payment determined pursuant to Section 5.01 is other than a straight life annuity or a qualified joint and survivor annuity,- the amount so determined

hereunder shall be reduced on an Actuarial Equivalent basis to reflect such other payment form with the exception that the interest assumption shall in no event be less than five percent (5%).

If a Participant has completed ten (10) or more years of Benefit Accrual Service, the maximum monthly benefit payable in accordance with this Section 4.05 shall be the smaller of Section 4.05(a) and Section 4.05(b) following:

4.05(a) Seven thousand five hundred dollars ($7,500), or such greater amount, determined by the Secretary of Treasury as of January 1 of each calendar year. Such amount shall be the maximum monthly amount pursuant to

this Section 4.05(a) for that calendar year and shall apply to the Limitation Year ending with or within that calendar year.

4.05(b) The average monthly compensation the Participant received from the Employer during the three (3) consecutive calendar years which would produce the highest such average. For purposs of this paragraph, "compensation" shall mean a Participant's earned income, wages, salaries, fees for professional service and other amounts received for personal

services actually rendered in the course of employment with an Employer maintaining the Plan (including, but not limited to, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, and bonuses) and excluding the following:

(i) Employer contributions to a plan of a deferred compensation to the extent contributions are not included in gross income of the Employee for the taxable year in which contributed, or on behalf

of an Employee to a Simplified Employee Pension plan to the extent such contributions are deductible under IRC Section 219(b)(7), and any distributions from a plan of deferred compensation whether or not includable in the gross income of the Employee when distributed.

(ii) Amounts realized from the exercise of a non-qualified stock option, or when restricted stock (or property) held by an Employee becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

(iii) Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

(iv) Other amounts which receive special tax benefits, or contributions made by an Employer (whether or not under a salary reduction agreement) towards the purchase of a 403(b) annuity contract (whether or not the contributions are excludable from the gross income of the Employee).

Compensation for any Limitation Year is the compensation actually paid or includible in gross income during such year.

If the payment of a benefit to a Participant begins before he attains age sixty-two (62), the maximum benefit shall be actuarially adjusted to that amount which, if paid in the same form and beginning at the same time as his benefit, would be the Actuarial Equivalent of the maximum benefit payable in the normal form of retirement benefit beginning on the first day of the month coincident with or next following his attaining the age of sixty-two (62) with the exception that the interest assumption shall in no event be less than five percent (5%). The reductions required by this paragraph shall in no event reduce the monthly limitation in Section 4.05(a) below:

(i) Six thousand two hundred - fifty dollars ($6,250), if

the benefit begins on or after the Participant's attainment of age fifty-five (55) or

(ii) the Actuarial Equivalent of the six thousand two hundred fifty dolars ($6,250) monthly benefit at age fifty-five (55), if the benefit begins prior to such age.

If any retirement benefit commences under this Plan after the Participant has attained age sixty-five (65), the determination as to whether the dollar limitation referred to in Section 4.05(a) has been satisfied shall be made by adjusting said benefit to the Actuarial Equivalent of the benefit beginning at the attainment of age sixty-five (65)

with the exception that the interest assumption shall in no event be greater than five percent (5%).

Notwithstanding the preceding provisions of this Section 4.05, the benefits payable with respect to a Participant under this Plan shall be deemed not to exceed the limitations of this Section 4.05 if:

(a) the retirement benefits payable with respect to such Participant under this Plan and under all ohter "qualifed" Defined Benefit Plans to which the Employer contributes do not exceed ten thousand dollars ($10,000) for the applicable Plan Year and for any prior Plan Year and

(b) the Employer has not at any time maintained a "qualified" Defined Contribution Plan in which the

Participant participated.

If a Participant has completed less than ten (10) years of Benefit Accrual Service, the maximum monthly benefit payable in accordance with this Sectin 4.05 shall be the smaller of Section 4.05(a) and Section 4.05(b) above (or in the preceding paragraph, if applicable), multiplied by the ratio that the Participant's actual number of years of Benefit Accrual Service bears to ten (10).

In the event a Participant is covered by one or more Defined Benefit Plans maintained by the Employer, all such plans shall be aggregated in determining whether the maximum benefit limitations hereunder have been met. Further, the maximum retirement benefit as noted above may be decreased as determined necessary

by the Employer to ensure that all plans will remain qualified under the IRC. Any such adjustment by the Employer shall be communicated in writing to the Plan Administrator and the actuary employed on behalf of the Plan.

4.06 <u>Multiple Plan Participation</u> - If an Employee is a Participant in one or more Defined Benefit Plans and one or more Defined Contribution Plans maintained by the Employer, the sum of his Defined Benefit Plan Fraction and his Defined Contribution Plan Fraction shall not exceed 1.0 during any Limitation Year.

If the sum of the Defined Benefit Plan Fraction and the Defined Contribution Plan Fraction shall exceed 1.0 for any Limitation Year, the Employer shall adjust or freeze

the rate of benefit accrual for purposes of a Defined Benefit Plan or the amount of "Annual Additions" [as defined in IRC Section 415(c)(2)] to a Defined Contribution Plan on behalf of any Participant so that the sum of such fractions shall not exceed 1.0.

For purposes of maximum Annual Additions to Defined Contribution Plans and maximum annual benefits payable from Defined Benefit Plans, all Defined Contribution Plans and all Defined Benefit Plans respectively, whether or not terminated, shall be combined and treated as one plan.

For purposes of this Section 4.06, the term, "Defined Benefit Plan Fraction" shall mean a fraction the numerator of which is the Participant's projected annual benefit (as defined in the said defined

benefit plan) determined as of the close of the Limitation Year and the denominator of which is the lesser of:

4.06(a) the product of 1.25 multiplied by the dollar limitation in effect in Section 4.05(a) for such Limitation Year; or

4.06(b) the product of 1.4 multiplied by the amount which may be taken into account in Section 4.05(b) with respect to each individual under the Plan for such Limitation Year.

The term "Defined Contribution Plan Fraction" shall mean a fraction the numerator of which is the sum of all of the Annual Additions to the Participant's individual account under the plan as of the close of the

Limitation Year and the denominator of which is the sum of the lesser of the following amounts determined for such Limitation Year and for each prior Limitation Year of employment with the Employer:

4.06(c) the product of 1.25 multiplied by the dollar limitation in effect pursuant to IRC Section 415(c)(1)(A) for such year determined without regard to IRC Section 415(c)(6); or

4.06(d) the product of 1.4 multiplied by an amount determined pursuant to IRC Section 415(c)(1)(B) with respect to each individual under the Plan for such Limitation Year.

The limitation on aggregate benefits from a Defined Benefit Plan and a Defined Contribution Plan which is contained in Section 2004 of ERISA as amended shall be complied with by a reduction (if necessary) in the Participant's benefits unde this Defined Benefit Plan before a reduction of any such Defined Contribution Plan.

ARTICLE V

NORMAL AND OPTIONAL METHODS OF RETIREMENT BENEFIT PAYMENTS

5.01 Normal Form of Payment - The normal form of payment to which the retirement benefit indicated in Article IV applies shall be a monthly retirement benefit commencing on the Participant's Normal, Delayed or Early Retirement Date, or on the date as specified in Section 6.04 and

continuing on the first day of each month thereafter during his lifetime.

5.02 Available Options - On or about the later of (a) nine (9) months prior to the earlier of meeting the applicable requirements for early or normal retirement, or (b) commencement of participation, each Participant and his Spouse shall be given a written notice to the effect that benefits thereafter payable will be in the form specified in Section 5.04 unless the Participant, with the consent of his Spouse, elects to the contrary prior to the commencement of payments. The notice shall describe, in a manner intended to be understood by the Participant and his Spouse, the terms and conditions of the joint and survivor annuity specified in Section 5.04 and shall include a general

explanation of the financial effect of the election or absence of election.

In the event a Participant or his Spouse requests additional information, as permitted under the terms of the notice, commencement of benefits for any purpose hereunder shall not begin until at least ninety (90) days following the Participant's receipt of such additional information unless the Participant specifically elects earlier commencement.
receipt of such additional information unless the Participant specifically elects earlier commencement. (sic)

Pursuant to the provisions hereinbefore provided in this Section 5.02, each Participant, with the consent of his Spouse, shall have the right to elect to have his retirement benefit paid under any one of the

options hereinafter set forth in this Section 5.02 in lieu of the applicable retirement benefit otherwise provided for in Section 5.01. The amount of any optional retirement benefit shall be the Actuarial Equivalent of the amount of such retirement benefit that otherwise would have been payable to him as provided for in Section 5.01.

A Participant who desires to have his retirement benefit paid under one of the optional forms provided in this Section 5.02 shall make such an election by written request to the Plan Administrator on forms provided by the Plan Administrator. An election by a Participant to receive his retirement benefit under any of the optinal methods of payment as provided in this Section 5.02 may be revoked by such Participant in writing

to the Plan Administrator at any time prior to the commencement of his retirement benefit payments. Any such election or revocation will be subject to the approval of the Plan Administrator with the exception of any election or revocation of the normal form as provided in Section 5.01 or in the case of the joint and survivor annuity as provided in Section 5.04. After retirement benefit payments have commenced, no future elections or revocations of an optional form will be permitted under any circumstances.

5.02(a) PERIOD CERTAIN AND CONTINUOUS OPTION

A Participant may elect to receive a decreased retirement benefit during his lifetime, and in the event of his death

subsequent to retirement but before one hundred twenty (120) monthly retirement benefit payments have fallen due, such decreased retirement benefit shall be continued to his Beneficiary until the remainder of the one hundred twenty (120) monthly payments have been paid. If the designated Beneficiary is not living at the death of the Participant, the Actuarial Equivalent of the remaining certain payments shall be paid in a lump sum to the Participant's surviving Spouse, if any; if none, to the Participant's children who survive him, equally; or if none survive, then to the Participant's estate. If

payments are continued to a Beneficiary and the Beneficiary should then die before a combined total of one hundred twenty (120) monthly benefit payments have been made to the Participant and the Beneficiary, the Actuarial Equivalent of the remaining certain payments shall be paid in a lump sum to the estate of the Beneficiary.

5.02(b) JOINT AND SURVIVOR OPTION

A Participant may elect to receive a decreased retirement benefit during his lifetime and have such decreased retirement benefit (or a designated fraction thereof) continue after his death to his designated Beneficiary, during the lifetime of the Beneficiary. If the

designated Beneficiary is not living at the death of the Participant, no additional benefits shall be payable on behalf of the Participant.

5.02(c) OTHER OPTIONS

With the specific consent of the Plan Administrator and the Trustee, a Participant may elect to receive the Actuarial Equivalent of his retirement benefit in such other manner as he may choose, including a lump sum payment. This election shall only be applicable upon the Participant's actual retirement.

5.03 Maximum Option Payable - In the event a Participant elects to have his retirement benefit paid under Section 5.02(b) and the designated Beneficiary

is not the Spouse of the Participant, the option elected shall be restricted so that the present value of the payments expected to be made to the Participant is fifty percent (50%) or more of the present value of the total payments expected to be made to the Participant and his Beneficiary.

5.04 Automatic Option - Unless a Participant, with the consent of his Spouse, has elected an optional form of payment under Section 5.02 and has not revoked same, or has elected to be excluded from the effects of this automatic option, it shall be automatically assumed that the Participant elected the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of his amount payable after his death to his designated Beneficiary and with his

Spouse on the effective date of this option designated as his Beneficiary. Such automatic option shall become effective and benefits adjusted accordingly as of the date benefit payments commence.

It is specifically provided that the Spouse of the Participant shall consent in writing to any form of payment other than that provided under this Section 5.04, and such consent shall be witnessed by the Plan Administrator or a notary public. The Plan Administrator may accept an election other than that provided hereunder without the consent of the Spouse if there is no Spouse, the Spouse cannot be located, or such other circumstances as may be prescribed by regulations. Any spousal consent shall only be

applicable to the Spouse granting such consent.

5.05 Payment of Benefits - Unless the Participant otherwise elects under the provisions of the Plan, any payment of benefits to the Participant shall begin not later than sixty (60) days after the close of the Plan Year in which occurs the latest of:

5.05(a) the Participant's reaching his Normal Retirement Age;

5.05(b) the tenth (10th) anniversary of the date the Employee becomes a Participant; and

5.05(c) termination of service of the Participant.

Notwithstanding anything contained herein to the contrary, the entire interest of each Participant or former Participant either:

5.05(d) will be distributed to him not later than the April 1 following the calendar year in which he attains age seventy and one-half (70 1/2) or, in the case of an Employee other than a five percent (5%) owner determined pursuant to IRC Section 416(i)(1)(B), in the calendar year in which he retires, whichever is later, or

5.05(e) will be distributed, commencing no later than such April 1

(i) in accordance with regulations prescribed by the Secretary of Treasury, over the life of such Employee or over the lives

of such Employee and his Beneficiary, or

(ii) in accordance with such regulations, over a period not extending beyond the life expectancy of such Employee or the life expectancies of such Employee and his Beneficiary.

Further, except as provided in Section 5.05(f) following, if an Employee dies before the distribution of the Employee's interest begins pursuant to Section 5.05(e) above, the entire interest of the Employee will be distributed within five (5) years after the death of such Employee.

5.05(f) The immediately preceding sentence shall not be applicable provided:

(i) any portion of the Employee's interest is payable to (or for the benefit of) a designated Beneficiary;

(ii) such portion will be distributed (in accordance with regulations) over the life of such designated Beneficiary (or over a period not extending beyhond the life expectancy of such Beneficiary);

(iii) such distributions begin not later than one (1) year after the date of the Employee's death or such later date as the Secretary of Treasury may by regulation prescribe; or

(iv) the designated Beneficiary

is the surviving Spouse of the Employee and distributions commence on or before the date on which the Employee would have attained age seventy and one-half (70 1/2).

If the surviving Spouse dies before the distribution to such Spouse, this Section 5.05(f) shall be applied as if the surviving Spouse were the Employee.

5.04(g) If distributions have begun and if the Participant dies before his entire interest has been paid to him, then the remainder of the interest will be distributed to his Beneficiary at least as

rapidly as it would have been distributed to the Participant under the method of distribution in effect as of the date of the Participant's death.

5.05(h) For purposes of this Section, the life expectancy of an Employee and the Employee's Spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

5.05(i) Under regulations prescribed by the Secretary of Treasury for purposes of this Section, any amount paid to a child shall be treated as if it had been paid to the surviving

Spouse if such amount will become payable to the surviving Spouse upon such child reaching majority (or other designated event permitted by regulation).

ARTICLE VI

BENEFITS ON DEATH OR TERMINATION OF EMPLOYMENT

6.01 <u>Death After Eligibility for Retirement</u> - In the event of the death of a Participant (a) prior to actual retirement but after having completed the eligibility requirements for normal or early retirement as set forth in Sections 3.01 and 3.03, (b) after attainment of his Normal Retirement Age or (c) who has retired but prior to the commencement of benefit payments, there shall be payable to his Spouse, if any, a

monthly benefit as hereinafter defined.

Said monthly benefit shall be equal to the benefit that would have been payable to the Participant's Spouse upon such Participant's death subsequent to retirement had he survived and retired on the first day of the month coinciding with or next following the date of his death, having elected to have his retirement benefit payable under the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of his amount payable after his death to his Beneficiary and with his Spouse designated as his Beneficiary. Said monthly benefit shall commence on the assumed date of retirement of the Participant and shall be continued to the Spouse on the first day of each

month thereafter during the lifetime of the Spouse.

6.02 <u>Death of a Vested Participant</u> - Effective for Participants with one (1) or more Hours of Service on or after December 1, 1984, in the event of the death of such active Participant or terminated Participant who has met the service requirement for full or retirement hereunder, there shall be payable to his Spouse, if any, a monthly benefit as hereinafter defined. Death benefits hereunder shall be payable only to the extent that they are not made available pursuant to Section 6.01.

The Participant's Spouse shall receive a monthly benefit based on the Participant's vested Accrued Benefit determined as of the date of the Participant's death which shall be

equal to the monthly benefit that would have been payable to the Participant's Spouse upon the Participant's death subsequent to retirement had he survived and retired on the first day of the month coinciding with or next following the earliest date under the Plan to which he would otherwise be eligible to commence a benefit pursuant to Section 6.04 having elected to have his retirement benefit payable under the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of such amount payable after his death to his Beneficiary and with his Spouse designated as his Beneficiary. Said monthly retirement benefit shll commence as of the first day of the month coinciding with or next following the first date on which the

Participant would have otherwise been eligible to commence benefits assuming he had survived to such date.

Notwithstanding the preceding, if the Actuarial Equivalent value of a benefit payable to the Spouse is equal to or less than three thousand five hundred dollars ($3,500), the Plan Administrator may direct that such benefit be paid in a lump sum to the Spouse. For purposes of determining the Actuarial Equivalent value of the benefit payable to the Spouse under this paragraph, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans terminating as of the first day of the Plan Year that contains the proposed distribution date. No lump sum

distribution shall be made hereunder after the day of the first period for which an amount is received as an annuity by the Spouse unless the Spouse consents in writing to such distribution.

6.03 Death Subsequent to Retirement - When a retired Participant who is receiving benefits hereunder shall die, his Spouse or Beneficiary shall be entitled to any benefits due under the basic or elected alternate form of payment of his monthly retirement benefit. Should the period of guaranteed payments be exhausted at the death of the retired Participant, no death benefit shall be payable. If a death benefit is payable under any alternate form except that provided in Section 5.04, the Plan Administrator may, in its discretion, elect to pay

the Beneficiary the Actuarial Equivalent value of the outstanding benefits in a single sum.

6.04 Termination of Employment - All rights to all benefits under the Plan will cease upon a Participant's termination of employment with the Employer or Affiliate prior to retirement, other than by death, except as otherwise provided in the following paragraphs of this Sectin 6.04 and in Section 6.02.

If the employment of a Participant is terminated with the Employer or Affiliate prior to retirement, other than by death, but after he has completed at least ten (10) years of Credited Service, he shall receive a monthly retirement benefit determined as hereinbelow provided, commencing on his Normal

Retirement Date, if he is then alive, and paid in accordance with Article V. In all events, a Participant shall be one hundred percent (100%) vested upon the attainment of his Normal Retirement Age.

The amount of monthly retirement benefit payable hereunder shall be determined as the Participant's Accrued Benefit as of his date of termination of employment.

In the event that a Participant entitled to a deferred retirement benefit under the provisions of this Section 6.04 should be later reemployed as an Employee prior to the commencement of such retirement benefit, his rights to any such retirement benefit shall thereupon be suspended, and the Participant's rights to benefits under the Plan

shall be subject to redetermination at any subsequent termination of employment or retirement under the Plan, in accordance with the provisions of the Plan then in effect.

Any amendments to the Plan made subsequent to the termination of employment of any Participant shall in no way affect the amount of retirement benefit to which such Participant is entitled except as otherwise specifically provided herein.

A terminated Participant who has completed at least thirty (30) years of Benefit Accrual Service at his date of termination of employment may elect, by written notice to the Plan Administrator, to have his otherwise deferred monthly retirement benefit commence on the first day of the month prior to his Normal Retirement Date

(but not prior to the date of his termination of employment with the Corporation). The amount of the monthly retirement benefit payable at such earlier commencement date shall be equal to the Actuarial Equivalent of his Accrued Benefit. If the Participant does not elect to commence benefit payments on that date, benefit payments shall commence on what would otherwise be his Normal Retirement Date. Notwithstanding anything contained herein to the contrary, upon a Participant's request, the Plan Administrator, in its sole discretion, may approve the commencement of benefit payments earlier than the Normal Retirement Date.

Notwithstanding any other provisions of this Plan, if (a) the Actuarial Equivalent of a terminated

or retiring Participant's vested benefit, as calculated at his date of severance, is equal to or less than one thousand seven hundred fifty dollars ($1,750) or a lesser amount if such lesser amount is prescribed by regulations of the Secretary of Treasury or (b) the Participant (and his Spouse if spousal consent is required by law) agrees in writing regardless of the amount of such Actuarial Equivalent, the Plan Administrator may direct that the Actuarial Equivalent of his vested benefits, as calculated as of the date of distribution, be paid in a lump sum to such terminated Participant. No other benefits of any type shall be payable to such former Participant or to his Spouse or Beneficiaries. If such terminated or retiring

Participant is subsequently reemployed and again becomes a Participant of his Plan, his Benefit Accrual Service hereunder shall not include any periods of employment prior to his reemployment date unless (a) the amount of such payment is repaid to the Fund, plus interest at five percent (5%) per annum between the date of payment and the date of repayment, (b) such repayment is made prior to the end of a period of five (5) consecutive One Year Breaks in Service and (c) the distribution is made no later than the close of the second (2nd) Plan Year following the Plan Year in which the termination occurs. Such five percent (5%) shall automatically be adjusted to reflect any regulation issued by the Secretary of Treasury changing such interest

rate for mandatory employee contributions. If such amount (plus interest) is repaid, the Participant's Benefit Accrual Service shall be based on all periods of employment subject to any restrictions in Section 1.06.

In the event the distribution was not made by the end of the second (2nd) Plan Year following the Plan Year in which the termination occurred, such prior Benefit Accrual Service shall be included under the Plan with such result reduced by the Accrued Benefit attributable to such prior distribution.

Notwithstanding the preceding, effective December 1, 1985, the one thousand seven hundred fifty dollar ($1,750) amount hereinbefore provided shall be increased to three thousand five hundred dollars ($3,500). For

purposes of determining the Actuarial Equivalent value of the benefit payable hereunder, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans terminating as of the first day of the Plan Year that contains the proposed distribution date.

ARTICLE VII

FUNDING

7.01 Contributions by the Employer - The entire cost of benefits under the Plan shall be borne by the Employer through the Fund. The Employer intends to make its Contributions in such actuarially determined amounts as shall be sufficient to provide the benefits of the Plan and meet the minimum funding standards as required

by law. Funds released through terminations of employment shall be applied to reduce the Employer's future Contributions.

7.02 Trust Fund - On behalf of all Employers, the Corporation will enter into an agreement with the Trustee, whereunder the Trustee will receive, invest and administer as a trust fund all Contributions made under this Plan in accordance with the Trust Agreement. The provisions of such Trust Agreement are incorporated by reference as a part of the Plan, and the rights of all persons hereunder are subject to the terms of the Trust Agreement. The Trust Agreement specifically provides, among other things, for the investment and reinvestment of the Fund and the income thereof, the management of the

Fund, the responsibilities and immunities of the Trustee, removal of the Trustee and appointment of a successor, accounting by the Trustee and the disbursement of the Fund.

The Fund, resulting from Contributions, earnings, profits, increments and accruals thereon, may be used only for the benefit of the Participants, Spouses and Beneficiares, or payment of reasonable expenses of administering the Plan except as provided in Section 9.02 and in Section 12.08.

7.03 <u>Funding Standard Account</u> - The Corporation (who shall be the plan administrator for all Employers in regard to this appointment) shall engage, on behalf of all Participants, an actuary, an insurance company or an actuarial firm which maintains on its

staff at least one (1) person who is recognized by the Secretaries of Labor and Treasury as an enrolled actuary. In addition to performing actuarial valuations and providing actuarial statements as necessary for the annual reports required by the Secretary of Labor, such actuary shall maintain a funding standard account in accordance with rules and regulations as from time to time shall be set forth by the Secretary of Treasury or his delegate. The status of such funding standard account shall be reported on an annual basis to the Employer and such government agencies as may be required.

The actuary, in maintaining the funding standard account, (a) may rely upon any certification or other information relating to employee data,

Fund assets, and Contribution amounts and dates made as provided or caused to be provided the actuary by the Employer, the Trustee, the independent qualified public accountant or any Fiduciary to the extent such reliance is so stated by the actuary in his certification or report; and (b) shall utilize such actuarial assumptions and methods, which in the aggregate, are reasonable taking into account the experience of the Plan and reasonable expectations and which, in combination, offer the actuary's best estimate of anticipated experience under the Plan.

ARTICLE VIII

FIDUCIARIES

8.01 General - Each Fiduciary who is allocated specific duties or responsibilities under the Plan or any

Fiduciary who assumes such a position with the Plan shall discharge his duties solely in the interest of the Participants, Spouses and Beneficiaries and for the exclusive purpose of providing such benefits as stipulated herein to such Participants, Spouses and Beneficiairies, or defraying reasonable expenses of administering the Plan. Each Fiduciary in carrying out such duties and responsibilities shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in exercising such authority of duties.

A Fiduciary may serve in more than one Fiduciary capacity and may

employ one or more persons to render advice with regard to his Fiduciary responsibilities. If the Fiduciary is serving as such without compensation, all expenses reasonably incurred by such Fiduciary shall be reimbursed by the Employer or, at the Corporation's direction, from the Fund.

A Fiduciary may allocate any of his responsibilities for the operation and administration of the Plan. In limitation of this right, a Fiduciary may not allocate any responsibilities as contained herein relating to the management or control of the Fund except through the employment of an investment manager as provided in Section 8.03 and in the Trust Agreement.

8.02 Employer Responsibilities - The Employer established and maintains the

Plan for the benefit of its Employees and of necessity retains control of the operation and administration of the Plan. The Employer in accordance with specific provisions of the Plan has, as herein indicated, delegated certain of these rights and obligations to the Corporation, the Trustee and the Plan Administrator and these parties shall be solely responsible for these, and only these, delegated rights and obligations.

The Corporation shall cause periodic actuarial valuations of the Plan to be made which will indicate the amount of Contributions necessary to maintain the Plan on an actuarially sound basis and comply with the minimum funding standards as may be required by law, such actuarial valuation to be made at least once

every three (3) years. The Corporation shall provide the Trustee or an investment manager, if one has been employed as herein provided, with a copy of the results of each actuarial valuation or shall otherwise communicate to the Trustee or investment manager, if applicable, the short and long-range requirements of the Fund, the anticipated level of annual Contributions and any material changes thereto occurring between actuarial valuations.

The Employer shall supply such full and timely information for all matters relating to the Plan as (a) the Plan Administrator, (b) the Trustee, (c) the actuary and (d) the accountant, if any, engaged on behalf of the Plan by the Corporation, may require for the effective discharge of

their respective duties.

8.03 Trustee - The Trustee, in accordance with the Trust Agreement, shall have exclusive authority and discretion to manage and control the Fund, except that the Corporation (who shall be the named Fiduciary for all Employers in regard to this appointment) may in its discretion employ at any time and from time to time an investment manager (as defined in section 3(38) of ERISA) to direct the Trustee with respect to all or a designated portion of the assets comprising the Fund.

8.04 Plan Administrator - As of July 19, 1984, the United States District Court for the Western District of Virginia, Roanoke Division, dissolved the Administrative Committee and appointed the Bankruptcy Trustee as the Plan Administrator.

In accordance with the provisions hereof, the Plan Administrator has been delegated certain administrative functions relating to the Plan with all powers necessary to enable it properly to carry out such duties. The Plan Administrator shall have no power in any way to modify, alter, add to or subtract from, any provisions of the Plan except as may be granted by a court of competent jurisdiction. The Plan Administrator shall have powers to construe the Plan and to determine all questions that may arise thereunder relating to (a) the eligibility of individuals to participate in the Plan, (b) the amount of retirement benefit or other benefits to which any Participant, Spouse or Beneficiary may become entitled hereunder, and (c) any

situation not specifically covered by the provisions of the Plan. All disbursements by the Trustee, except for the ordinary expenses of administration of the Fund or the reimbursement of reasonable expenses at the direction of the Corporation as provided herein, shall be made upon, and in accordance with, the written directions of the Plan Administrator. When the Plan Administrator is required in the performance of its duties hereunder to administer or construe, or to reach a determination, under any of the provisions of the Plan, it shall do so in a uniform, equitable and non-discriminatory basis.

The Plan Administrator shall establish rules and procedures to be followed by the Participants, Spouses

and Beneficiaries in filing applications for benefits and for furnishing and verifying proofs necessary to establish age, years of Credited Service, years of Benefit Accrual Service, Final Average Compensation, Primary Social Security Benefit and any other matters required in order to establish their rights to benefits in accordance with the Plan.

8.05 Claims for Benefits - All claims for benefits under the Plan shall be submitted to the Plan Administrator who shall have the responsibility for determining the eligibility of any Participant, Spouse or Beneficiary for benefits. All claims for benefits shall be made in writing and shall set forth the facts which such Participant, Spouse or Beneficiary believes to be sufficient to entitle

him to the benefit claimed. The Plan Administrator may adopt forms for the submission of claims for benefits in which case all claims for benefits shall be filed on such forms. The Plan Administrator shall provide Participants, Spouses and Beneficiaries with all such forms.

Upon receipt by the Plan Administrator of a claim for benefits, it shall determine all facts which are necessary to establish the right of an applicant to benefits under the provisions of the Plan and the amount thereof as herein provided. The Plan Administrator shall approve, deny and investigate all questionable claims. Upon request, the Plan Administrator will afford any applicant the right of a hearing with respect to any finding of fact or determinatin related to any

claim for benefits under the Plan. In the event any claim for benefits is denied, the Participant, Spouse or Beneficiary shall be notified of such decision in accordance with the provisions of Section 8.06.

8.06 Claims Procedures - The applicant shall be notified in writing of any adverse decision with respect to his claim within ninety (90) days after its submission. The notice shall be written in a manner calculated to be understood by the applicant and shall include:

8.06(a) The specific reason or reasons for the denial;

8.06(b) Specific references to the pertinent Plan provisions on which the denial is based;

8.06(c) A description of any

additional material or information necessary for the applicant to perfect the claim and an explanation why such material or information is necessary; and

8.06(d) An explanation of the Plan's claim review procedures.

If special circumstances require an extension of time for processing the initial claim, a written notice of the extension and the reason therefor shall be furnished to the claimant before the end of the initial ninety (90) day period. In no event shall such extension exceed ninety (90) days.

In the event a claim for benefits is denied or if the applicant has had

no response to such claim within ninety (90) days of its submission (in which case the claim for benefits shall be deemed to have been denied), the applicant or his duly authorized representative, at the applicant's sole expense, may appeal the denial to the Plan Administrator within sixty (60) days of the receipt of written notice of the denial or sixty (60) days from the date such claim is deemed to be denied. In pursuing such appeal the applicant or his duly authorized representative:

8.06(e) may request in writing that the Plan Administrator review the denial;

8.06(f) may review pertinent documents; and

8.06(g) may submit issues and comments in writing.

The decision on review shall be made within sixty (60) days of receipt of the request for review, unless special circumstances require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than one hundred twenty (120) days after receipt of the request for review. If such an extension of time is required, written notice of the extension shall be furnished to the claimant before the end of the original sixty (60) day period. The decision on review shall be made in writing, shall be written in a manner calculated to be understood by the claimant, and shall include specific references to the provisions of the Plan on which the denial is based. If the decision on review is not

furnished within the time specified above, the claim shall be deemed denied on review.

8.07 Records - All acts and determinations of the Plan Administrator shall be duly recorded and all such records, together with such other documents as may be necessary in exercising its duties under the Plan shall be preserved in the custody of the Plan Administrator. Such records and documents shall at all times be open for inspection to, and for the purpose of making copies by, any person designated by the Corporation. The Plan Administrator shall provide such timely information, resulting from the application of its responsibilities under the Plan, as needed by (a) the Trustee, (b) the actuary and (c) the accountant, if any, engaged on behalf

of the Plan by the Corporation, for the effective discharge of their respective duties.

8.08 Missing Persons - The Plan Administrator shall direct the Trustee to make a reasonable effort to locate all persons entitled to benefits under the Plan; however, notwithstanding any provision in the Plan to the contrary, if, after a period of five (5) years from the date such benefit shall be due, any such persons entitled to benefits have not been located, their rights under the Plan shall stand suspended. Before this provision becomes operative, the Trustee shall send a certified letter to all such persons at their last known address advising them that their interest or benefits under the Plan shall be suspended. Any such suspended amounts

shall be held by the Trustee for a period of three (3) additional years (or a total of eight (8) years from the time the benefits first become payable). Provided, however, that if a person subsequently makes a valid claim with respect to such suspended benefits, his right to benefits shall be reinstated.

ARTICLE IX

AMENDMENT AND TERMINATION OF THE PLAN

9.01 Amendment of the Plan - The Corporation shall have the right at any time by action of the Board to modify, alter or amend the Plan in whole or in part; provided, however, that the duties, powers and liabilities of the Trustee hereunder shall not be increased without its written consent; and provided, further, that the amount of benefits

which at the time of any such modification, alteration or amendment shall have accrued for any Participant, Spouse or Beneficiary hereunder shall not be adversely affected thereby; and provided, further, that no such amendment shall have the effect of revesting in the Employer any part of the principal or income of the Fund.

9.02 Termination of the Plan - The Employer expects to continue the Plan indefinitely, but continuance is not assumed as a contractual obligation and each Employer reserves the right at any time by action of its board of directors to terminate the Plan as applicable to itself. If the Employer terminates or partially terminates the Plan, or it is otherwise terminated or partially terminated, the rights of

the Participants affected thereby to benefits then accrued shall be nonforfeitable and the Trustee shall continue to administer the Fund as instructed by the Plan Administrator in accordance with the provisions hereof, and the expenses of the Trustee shall be paid out of the assets then remaining in the Fund. Notwithstanding the above, no Participant shall have any recourse toward the satisfaction of his Accrued Benefit from other than assets of the Plan or the Pension Benefit Guaranty Corporation (PBGC) if there shall be a PBGC liability present.

In the event of termination of the Plan as provided in this Article IX, the Plan Administrator shall determine the equitable share of the Fund with respect to any Employer for

whom the Plan has terminated. The administration of that portion of the Fund applicable to any Employer for which the Plan has not been terminated shall be unaffected and any references hereinafter contained in this Article IX to the Fund shall refer only to that portion applicable to the Employer for whom the Plan has terminated. Reasonable expenses incurred by the Plan Administrator in the termination of the Plan shall be payable from the Fund unless paid directly to such Employer.

The Plan Administrator shall allocate and administer the Fund to provide benefits for the Participants on the date of termination and any Spouses or Beneficiaries then receiving benefits in accordance with Article V. Such allocation of the

Fund shall be made in the order of precedence indicated and in the amounts indicated in Section 4044 of ERISA as said Section may be amended, according to principles set forth in said Section and such other portions of said Act as it incorporates by reference. For the purpose of making such allocation any regulations issued pursuant to that Section shall be deemed part of such Section.

The allocation of that portion of the Fund computed above shall be based on the method of payment of monthly retirement benefits or death benefits as specified in the Plan. In the event that Fund assets on or after the date of termination are insufficient to fund all benefits within any class, the benefits of all higher order of precedence shall be funded, the

benefits of all lower order of precedence shall be unfunded, and the assets remaining shall be allocated among members of that class on the basis of their respective actuarial reserves, subject to the provisions of Section 4044 of ERISA.

In the event of failure of an Employer upon termination of its participation in this Plan to pay or to reimburse the Trustee, the actuary, accountant or attorney for the outstanding charges or expenses incurred hereunder, the Trustee is empowered to satisfy such claims by lien upon that portion of the Fund attributable to that Employer, prior to making any allocation to Participants, vested terminated Participants, retired Participants, disabled Participants, Spouses and

Beneficiaries of the Plan in accordance with this Article IX.

The application of the Fund on the foregoing basis shall be calculated by the actuary and certified to the Trustee by the Plan Administrator as of the date on which the Plan terminated. Subject to the restrictions of ERISA, as it may be amended, when the calculations shall be completed, the interest of each Participant, vested terminated Participant, retired Participant, disabled Participant, Spouse and Beneficiary shall continue to be held in the Fund pursuant to the terms of this Article IX, or, at the direction of the Plan Administrator, the appropriate portion of the Fund shall be liquidated and each of their interests distributed to them in the

form of annuity contracts, annuity payments, installments or in a lump sum as determined by the Plan Administrator; provided, however, that any funds remaining after the satisfaction of all liabilities to such Participants, vested terminated Participants, retired Participants, disabled Participants, Spouses and Beneficiaries under this Plan due to erroneous actuarial computation or assumptions shall be returned to the appropriate Employer.

9.03 Twenty-five (25) Highest Paid Limitation - In the event that the Plan is terminated or a lump sum distribution is made to a Participant who is one of the Twenty-five (25) Highest Paid Employees at any time before the Expiration Date, the following rules shall apply:

9.03(a) Upon the occurrence of either of the above conditions, the Basic Benefit and any Additional Benefit which may be provided from Contributions by the Employer for any of its Twenty-five (25) Highest Paid Employees shall not be greater than the amount of benefits which can be provided by the larger of the following amounts prior to the satisfaction of all Plan liabilities relating to other Plan Participants to whom this Section 9.03 does not apply:

9.03(a)(i) Twenty thousand dollars ($20,000).

9.03(a)(ii) An amount equal to twenty percent (20%) of the first fifty thousand dollars ($50,000) of the Employee's average annual compensation for the preceding five (5) years multiplied by the number of years since the Revision Date, as hereinafter defined.

9.03(a)(iii) With respect to a substantial Owner, the dollar amount which equals the Actuarial Equivalent of the benefit guaranteed for such affected Participant under Section 4022 of ERISA, or if the Plan has not terminated, the Actuarial Equivalent of the benefit that would be

guaranteed if the Plan terminated on the date the benefit commences, determined in accordance with regulations of the Pension Benefit Guaranty Corporation (PBGC).

With respect to Participants other than Substantial Owners, the dollar amount which equals the Actuarial Equivalent of the maximum benefit described in Section 4022(b)(3)(B) of ERISA (determined on the date the Plan terminates or on the date benefits are distributed, as if the Plan terminated, whichever is earlier and determined in

accordance with PBGC regulations) without regard to any other limitation in Section 4022 of ERISA.

9.03(b) The provisions of Section 9.03(a) shall not restrict the current payment of full retirement benefits called for by the Plan for any retired Employee while the Plan is in full effect. In the event that any funds are realized by operation of the restrictions set forth in Section 9.03(a), they shall be used to reduce subsequent Contributions by the Employer or if the Employer has ceased its Contributions, they shall

be used for the benefit of Employees other than those restricted by Section 9.03(a) on a basis which shall not result in substantial discrimination in favor of the more highly-compensated Employees, but subject to any reversion of assets on Plan termination pursuant to Section 9.02;

9.03(c) For purposes of this Section 9.03, the following definitions shall apply:

9.03(c)(i) "Additional Benefits" - the benefits provided by the Plan which are over and above those which would have been provided by the provisions of the Plan in

effect prior to the applicable Revision Date had the Plan been continued without changes;

9.03(c)(ii) "Basic Benefit" - the benefit initially provided by the Plan less any Additional Benefits;

9.03(c)(iii) "Expiration Date" - the tenth (10th) anniversary of any Revision Date;

9.03(c)(iv) "Revision Date" - the effective date of adoption of the Plan by the Employer or the effective date of any amendment to the Plan which increases the benefits;

9.03(c)(v) "Substantial Owner" - a Participant defined in - Section 4022(b)(5) of

ERISA; and

9.03(c)(vi) "Twenty-five (25) Highest Paid Employees" - the twenty-five (25) highest paid Employees of the Employer as of the applicable Revision Date, excluding, however, any Employee whose anticipated annual benefits are not expected to exceed fifteen hundred dollars ($1,500).

9.03(d) If, during the first ten (10) years after a Revision Date, any benefit is to be distributed to a Participant to whom this Section 9.03 is applicable in a lump sum (the amount of which represents the lump sum Actuarial

Equivalent of the retirement benefit to which the Participant otherwise would be entitled to receive as the normal form of pension), the Participant, prior to the payment of such lump sum, shall enter into an agreement with the Employer. This agreement shall be in accordance with requirements prescribed by the Plan Administrator, Revenue Ruling 81-135 and any rulings or regulations amendatory thereof, including provisions that the Participant (or in the event of his daeth, his estate) will repay to the

Fund a sum, as determined by the actuary, equal to the Actuarial Equivalent of the amounts by which the Participant's monthly retirement benefit under the Plan would have been decreased during his then remaining lifetime in accordance with this Section 9.03, and secure such obligations to repay in the event the limitations contained in this Sectin 9.03 become effective. The agreement shall further require the Participant, promptly after the distribution to him of the lump sum payment under the Plan, to deposit as

security with a depositary, satisfactory to the Employer and the Plan Administrator, property real or personal, having a market value, as determined by the depositary, as of the date of deposit at least equal to one hundred twenty-five percent (125%) of the amount which would be repayable if the Plan had terminated on the date of distribution of such lump sum. In the event that the market value, as determined by the depositary, of such property falls below one hundred ten percent (110%) of the amount as determined

by the actuary, which would have been repayable to the Fund, the Participant shall deposit with the depositary additional properties so as to render the total market value, as determined by the depositary, of the security deposited equal to one hundred twenty-five percent (125%) of the amount which would have been repayable as determined by the actuary. If the conditions of this Section 9.03(d) are met for the ten (10) year period following such Revision Date, and the Plan is not terminated, such property deposited as security in the Fund shall

be redelivered to such Participant.

9.03(e) The provisions of this Section 9.03 apply to former or retired Participants, as well as to Participants in active service.

9.03(f) In the event that it should be determined by statute, court decision in which the Internal Revenue Service acquiesces, ruling by the Internal Revenue Service, or otherwise, that the provisions of this Section 9.03 are no longer necessary to qualify the Plan under the IRC, this Section 9.03 shall be ineffective without

amendment to the Plan.

ARTICLE X

PROVISIONS RELATIVE TO EMPLOYERS INCLUDED IN PLAN

10.01 Method of Participation - Any corporation which is a member of the same controlled group of corporations as the Corporation, with the approval of the Board, by taking appropriate board action may become a party to the Plan, by adopting the Plan as a retirement plan for its Employees. Any corporation which becomes a party to the Plan shall thereafter promptly deliver to the Trustee under the Trust Agreement provided for in Article VII a certified copy of the resolutions or other documents evidencing its adoption of the Plan and also a written instrument showing the Board's approval of such corporation's

becoming a party to the Plan. This Plan shall be construed as a single Plan for all participating Employers.

10.02 Withdrawal - Any one or more of the Employers included in the Plan may withdraw from the Plan at any time by giving six (6) months advance notice in writing of its or their intention to withdraw to the Board and the Plan Administrator (unless a shorter notice shall be agreed to by the Board).

Upon receipt of notice of any such withdrawal, the Plan Administrator shall certify to the Trustee the equitable share of such withdrawing Employer in the Fund (to be determined by the actuary employed on behalf of the Plan by the Corporation), and the Trustee shall thereupon set aside from the Fund then held by it such securities and other

property as it shall, in its sole discretion, deem to be equal in value to such equitable share. If the Plan is to be terminated with respect to such Employer, the amount set aside shall be dealt with in accordance with the provisions of Section 9.02. If the Plan is not to be terminated with respect to such Employer, the Trustee shall turn over such amount to the trustee as may be designated by such withdrawing Employer, and such securities and other property shall thereafter be held and invested as a separate retirement trust of the Employer which has so withdrawn, and shall be used and applied according to the terms of a new agreement and declaration of trust between the Employer so withdrawing and the trustee so designated.

Neither the segregation of the Fund assets upon the withdrawal of an Employer, nor the execution of a new agreement and declaration of trust pursuant to any of the provisions of this Section 10.02, shall operate to permit any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the benefit of Participants, Spouses and Beneficiaries (including the payment of reasonable expenses of administering the Plan), except as may be otherwise provided in Section 9.02 and Section 12.08.

ARTICLE XI

TOP HEAVY PLAN PROVISIONS

11.01 General - Notwithstanding anything contained herein to the contrary, in the event that this Plan when combined with all other plans required to be

aggregated pursuant to IRC Section 416(g) is deemed to be a Top Heavy Plan for any Plan Year, the following conditions shall become operative.

11.02 Vesting - In the event that vesting schedule provided in Section 6.04 is less liberal than the vesting schedule hereinafter provided, then such vesting schedule shall be substituted with the following for each Participant wi·h an Hour of Service after the Plan becomes a Top Heavy Plan and such schedule shall remain in effect in all future Plan Years.

Years of Credited Service	Vested Percentages
Less than 2 years	0%
2 years but less than 3 years	20%
3 years but less than 4 years	40%
4 years but less than 5 years	60%
5 years but less than 6 years	80%
6 years or more	100%

11.03 Minimum Benefits - For the first Plan Year commencing on or after January 1, 1984, that the Plan shall be deemed a Top Heavy Plan, and any Plan Year thereafter in which the Plan is a Top Heavy Plan, there shall be a minimum annual Accrued Benefit applicable to all non-Key Employees who are Partcipants equal to the lesser of two percent (2%) of Top Heavy Compensation multiplied by the Participant's number of years of Top Heavy Service or twenty percent (20%) of his Top Heavy Compensation.

11.04 Definitions - For purposes of this Article XI, the following definitions shall be applicable.

11.04(a) "Top Heavy Compensation" means his average annual Full Compensation during that period

of five (5) consecutive Testing Years for which his aggregate Full Compensation was the greatest. If he shall have fewer than five (5) consecutive Testing Years, his Top Heavy Compensation shall mean his average annual Full Compensation during that period containing the largest number of consecutive Testing Years; provided that, if there shall be more than one such period, Top Heavy Compensation shall be calculated on the basis of such period for which such average is the greatest.

11.04(b) "Testing Year" means a Plan Year which (1) constitutes a year of Benefit Accrual Service for such Participant and (2)

begins prior to the end of the last Plan Year for which the Plan was a Top Heavy Plan. Except to the extent excluded under the preceding sentence, Plan Years beginning before 1984 shall be Testing Years.

11.04(c) "Full Compensation" means, for any Employee for any Plan Year, his compensation [as such term is defined in Section 4.07(b)] from the Employer or Affiliate for such Plan Year except that Full Compensation for any Plan Year in which the Plan is deemed to be a Top Heavy Plan shall not exceed two hundred thousand dollars ($200,000) or such greater amount as may be determined by the Secretary of Treasury

pursuant to IRC Section 416(d)(2).

11.04(d) "Top Heavy Service" means a year of Benefit Accrual Service in which the Plan is deemed to be a Top Heavy Plan with the exception that Benefit Accrual Service prior to January 1, 1984, shall be excluded.

11.05 Multiple Plan Participation - In the event the Plan is deemed to be a Top Heavy Plan for the Plan Year, then the multiplier of 1.25 in Section 4.08(a) and Section 4.08(c) shall be reduced to 1.0 unless

(i) All plans required to be aggregated and any other plans which may be permissively aggregated pursuant to IRC Section 416(g) are ninety percent (90%) or less top heavy,

and

(ii) The minimum accrued benefit referenced in IRC Section 416(c)(1) is modified by substituting in Section 11.03 three percent (3%) for two percent (2%) and by increasing twenty percent (20%) by one (1) percentage point for each year of Top Heavy Service (but not by more than ten (10) percentage points).

11.06 No Duplication of Minimum Benefit - With respect to the operation of these Top Heavy Plan provisions, there shall be no requirement that the entire defined benefit minimum benefit and the defined contribution minimum contribution be provided. To the extent that there shall be a defined benefit-Accrued Benefit, it shall be

controlling. To the extent that there shall be an Employer contribution to a Defined Contribution Plan, then there shall be a determination as to whether the defined contribution amount is comparable to the difference between the defined benefit minimum benefit and the minimum defined benefit accrued benefit required under IRC Section 416. In the event that the defined contribution amount shall not be comparable, then the difference shall be provided in the Defined Benefit Plan unless the next sentence shall apply. Notwithstanding the above, if there shall be a contribution to the Defined Contribution Plan of at least seven and one-half percent (7 1/2%) of compensation to non-Key Employees, it shall be conclusively presumed that

the minimum benefit and/or contribution rquirements of Top Heavy Plans have been met.

11.07 Actuarial Assumptions - For purposes of determining whether a Defined Benefit Plan is a Top Heavy Plan, calculations shall be based upon The UP-1984 Table of Mortality at six percent (6%) interest with such determination being made on the valuation date which occurs within the Plan Year. In the event more than one (1) plan is being used for Top Heavy Plan testing, the same actuarial assumptions shall be used for all such plans. Further, pursuant to Internal Revenue Service Regulation 1.416-1, T-26 and T-27, proportional subsidies shall be ignored and non-proportional subsidies shall be considered.

ARTICLE XII

MISCELLANEOUS

12.01 Governing Law - The Plan shall be construed, regulated and administered according to the laws of the State of Virginia except in those areas preempted by the laws of the United States of America.

12.02 Construction - The headings and subheadings in the Plan have been inserted for convenience of reference only and shall not affect the construction of the provisions hereof. In any necessary construction the masculine shall include the feminine and the singular the plural, and vice versa.

12.03 No Employment Contract - This Plan shall not be deemed to constitute a contract between the Employer and any Participant or to be a consideration or inducement for the employment of

any Participant or employee. No Participant in the Plan shall acquire any right to be retained in the Employer's employ by virtue of the Plan, nor, upon his dismissal or upon his voluntary termination of employment, shall he have any right or interest in and to the Fund other than as specifically provided herein. Except to the extent required by law, the Employer shall not be liable for the payment of any benefit provided for herein; all benefits hereunder shall be payable only from the Fund, and only to the extent that the Fund is sufficient therefor.

12.04 Receipt Prior to Payment - The Trustee, the Plan Administrator, or the Employer, jointly or severally, may, but need not, require a written receipt as a condition precedent to

any payment called for by the Plan to be made to a Participant, Spouse, Beneficiary, or to their heirs, successors, executors and legal representatives.

12.05 <u>Payment to Minors and Incompetents</u> - Should any Participant, Spouse or Beneficiary be a minor or in the judgment of the Plan Administrator, be physically or mentally incapable of personally receiving and giving a valid receipt for any payment due him under the Plan, the Plan Administrator may make such payment or any part thereof to or for the benefit of such Participant, Spouse or Beneficiary, or directly to or for the benefit of any person determined by the Plan Administrator to have incurred expense or assumed responsibility for the expenses of such Participant, Spouse

or Beneficiary.

12.06 <u>Non-alienability of Benefits</u> - Except as provided in IRC Section 401(a)(13)(B) related to qualified domestic relations orders, no benefits or other amounts payable unde the Plan shall be subject in any manner to anticipation, sale, transfer, assignment, pledge, encumbrance, charge or alienation.

12.07 <u>Merger of Plans</u> - In the event of the merger or consolidation of the Plan with another plan or transfer of assets or liabilities from the Plan to another plan, each then Participant shall not, as a result of such event, be entitled on the day following such merger, consolidation or transfer under the termination of Plan provisions to a lesser benefit than the benefit he was entitled to on the

date prior to the merger, consolidation or transfer if the Plan had been terminated.

12.08 Mistake of Fact - Notwithstanding anything herein to the contrary, upon the Employer's request, a Contribution which was made by a mistake of fact, or conditioned upon initial qualification of the Plan or upon the deductibility of the Contribution under IRC Section 404, shall be returned to the Employer by the Trustee within one (1) year after the payment of the Contribution, the denial of the qualification or the disallowance of the deduction (to the extent disallowed), whichever is applicable. The portion of any Contribution which is to be returned to the Employer pursuant to this Section 12.08 must be reduced by its

proportionate share of losses and expenses of the Fund, if any, but shall not be increased by any income or gains of the Fund, if any.

12.09 Exclusive Benefit - The Employer shall be entitled to no part of the corpus or income of the Fund and no part thereof shall be used for or diverted to purposes other than for the exclusive benefit of Participants, Spouses and Beneficiaries hereunder except as provided in Section 9.02 and in Section 12.08.

12.10 Indemnification - The Employer shall indemnify and hold harmless each person or persons who may serve as the Plan Administrator from any and all claims, loss, damages, expense (including attorney's fees), and liability (including any amounts paid in settlement) arising from any act or

omission of such member, except when the same is judicially determined to be due to the gross negligence or willful misconduct of such member. No Plan assets may be used for any such indemnification.

12.11 Small Payments - If the Actuarial Equivalent of the retirement benefit payable to a Participant at retirement is less than three thousand five hundred dollars ($3,500), the Plan Administrator, at its discretion, may direct that benefit payments be made in a lump sum in lieu of periodic payments. For purposes of determining the Actuarial Equivalent value of the benefit payable hereunder, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans

terminating as of the first day of the Plan Year that contains the proposed distribution date.

12.12 Counterparts - The Plan and the Trust Agreement may be executed in any number of counterparts, each of which shall constitute but one and the same instrument and may be sufficiently evidenced by any one counterpart.

ARTICLE XIII

ADOPTION OF PLAN

Anything herein to the contrary notwithstanding, this Plan is amended and maintained under the condition that it shall continue to be approved and qualified by the Internal Revenue Service under IRC Section 401(a) and that the Trust hereunder is exempt under IRC Section 501(a), or under any comparable Sections of any future legislation which amends, supplements or supersedes such Sections. In the event

that it should be found by the Internal Revenue Service that the Plan as amended and restated hereby is not qualified, the Corporation may modify the Plan to meet Internal Revenue Service requirements or reinstate the Plan as in effect prior to such amendment and restatement.

As evidence of its adoption of the Plan, Coleman Furniture Corporation has caused this instrument to be signed by its duly authorized officers and its corporate seal to be affixed hereto this /s/ 1st day of /s/ December, 19/s/87.

COLEMAN FURNITURE CORPORATION

By: /s/ Roy V. Creasy
(Title)
/s/ Trustee in Bankruptcy

ATTEST:

By /s/ Kelly J. Weeks

APPENDIX

The term "Actuarial Equivalent" pursuant to Section 1.02 shall be based

upon the following:

Interest: (a) For lump sum payments, seven and one-half percent (7 1/2%)

(b) For all other purposes, six percent (6%)

Mortality: 1971 Group Annuity Mortality Table for males set back one (1) year for Participants and set back five (5) years for beneficiaries.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

IN RE:	)
	)
COLEMAN FURNITURE CORP.	) Bankruptcy No. 72-82-01410
Debtor	)

NCNB FINANCIAL SERVICES, INC. Plaintiff	)
v.	)
ROY V. CREASY, TRUSTEE FOR COLEMAN FURNITURE CORP.,	) Civil Action No. 86-0432
Defendants	)

ROY V. CREASY, TRUSTEE FOR COLEMAN FURNITURE CORP., DEBTOR	)
Counterclaimant	)
v.	) AFFIDAVIT
NCNB FINANCIAL SERVICES, INC. and NCNB NATIONAL BANK OF NORTH CAROLINA	)
Counter-Defendants	)

Comes now Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture

Corporation, relative to information sought by Steven Agee as concerns that certain law suit styled Creasy vs. Coleman Furniture Corporation Pension Plan, United States District Court # 86-0272-R.

Under oath I answer the following questions:

(1) Total plan assets: The total plan assets as of December 2, 1987 were $816,437.76.

(2) Description of what this total includes: The amount listed in Item 1 above is the balance in the trust fund at Signet Trust Company as of December 2, 1987. This is the balance after lump sum distributions were made or annuity contracts were purchased for all participants except Mr. Shumate, and administrative expenses through June, 1987 were paid.

(3) The amount paid into the Court

<u>under the agreed Order for Shumate</u>: $250,000.

(4) <u>Approximate expenses to close out the plan</u>: $50,000. This figure of $50,000 includes $32,000 of expenses which have been identified to date and estimated additional expenses including legal fees, actuarial fees, storage fees, PBGC filing fees, costs for preparation of annual reports, and prepayment of legal fees to answer questions which will probably come from participants or former employees in the next several years.

(5) <u>The amount already paid or committed for all participants except Shumate</u>: $568,822.48.

(6) <u>Approximate reversion to Creasy, Trustee in Bankruptcy</u>: $515,000 subject to potential claims of unaccrued benefits to participants.

(7) Also attached are copies of the

1963, 1976, and 1984 versions of the Pension Plan.

Subscribed and sworn to before me this 15th day of December, 1987, by Roy V. Creasy, Trustee in Bankruptcy.

<u>/s/ Kelly J. Weeks</u>
Notary Public

My Commission expires:

<u>/s/ October 29, 1991</u>

PETITIONER'S

BRIEF

(6)

No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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PETITION FOR CERTIORARI FILED
NOVEMBER 8, 1991

CERTIORARI GRANTED JANUARY 21, 1992

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

1. Does "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) include ERISA, 29 U.S.C. § 1056(d)(1), or is that term limited to state spendthrift trust law?

2. Does "property exempt under Federal law" in 11 U.S.C. § 522(b)(2) include a bankruptcy debtor's interest in a qualified retirement plan under 29 U.S.C. § 1056(d)(1)?

3. If 29 U.S.C. § 1056(d)(1) creates either a federal exemption under 11 U.S.C. § 522(b)(2) or is "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), does an enforceable public policy exist barring a bankruptcy debtor from sheltering his interest in a qualified retirement plan over which the debtor held significant dominion, control and revocation powers?

LIST OF PARTIES

The Petitioner is John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr. The Respondent is Joseph B. Shumate, Jr.

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No. 91-913

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE, *Petitioner*,

v.

JOSEPH B. SHUMATE, JR., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 943 F.2d 362. Petition Appendix 1a-17a (hereinafter Pet. App.). The opinion of the district court (Pet. App. 18a-46a) is reported at 83 B.R. 404.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-17a) was entered on August 12, 1991. The Petition for a Writ of Certiorari was filed on November 8, 1991, and was granted on January 21, 1992. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 11 U.S.C. § 522(b)(2)(A), (Pet. App. 60a);

2. 11 U.S.C. § 541(c)(2), (Pet. App. 61a);

3. 26 U.S.C. § 401(a)(13)(A), (Pet.

App. 62a);

4. 29 U.S.C. § 1056(d)(1), (Pet. App. 63a);

5. 29 U.S.C. § 1144(d), (Pet. App. 64a); and

6. 11 U.S.C. § 522(d)(10)(E).

> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> (10) The debtor's right to receive -- ...
>
> (E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(b), 408, or 409).

STATEMENT OF THE CASE

Joseph B. Shumate, Jr., (Shumate), the Respondent, was Chairman of the Board of Directors, President, and the majority shareholder of Coleman Furniture Corporation (CFC) from 1978 to February,

1983. Joint Appendix 119-123, Vol. I, (hereinafter J.A.). He controlled at least 96% of the issued and outstanding CFC stock, owning 54% of CFC stock outright and controlling another 42% through a revocable trust, of which he was settlor and trustee. Shumate eventually revoked the trust to own 96% of CFC stock outright. (J.A. 123, Vol. I).

In order to gain control of the majority of CFC stock in 1978, Shumate caused CFC to make a loan agreement with NCNB Financial Services, Inc., (NCNB) to finance the leveraged buyout of CFC stock held by other stockholders. (Pet. App. 38a). Shumate personally guaranteed NCNB's loan to CFC. The NCNB loan agreement with CFC contained a covenant limiting annual dividends to $50,000.00. (Pet. App. 39a).

As CFC's majority stockholder, Shumate could replace the CFC Board of

Directors at will. (J.A. 157, Vol. I). The CFC Board of Directors could terminate the Coleman Furniture Corporation Pension Plan (CFC Plan) at will without cause. (J.A. 157, Vol. I, and 475, Vol. II). At trial, the district court found "therefore, Shumate could have terminated the plan at any time before the bankruptcy and received not only his pension interest, but any excess funds not needed to satisfy the rights of other participants." (Pet. App. 23a). Shumate "could have paid himself the reversion of any overfunded amount as a dividend on his stock." (Pet. App. 37a).

CFC filed for bankruptcy under Chapter 11 of the Bankruptcy Code in November, 1982. Roy V. Creasy (Creasy) was appointed bankruptcy trustee for CFC in February, 1983, when CFC's case was converted to a Chapter 7 proceeding.

Shumate filed for Chapter 11

protection on June 1, 1984, which was converted to a Chapter 7 proceeding on August 24, 1984. John R. Patterson, the Petitioner (the Trustee), was then appointed trustee in bankruptcy for the Shumate bankruptcy estate.

In addition to his duties as trustee in bankruptcy for CFC, Creasy was appointed Plan Administrator of the CFC Plan. CFC established the CFC Plan in 1963 and maintained it as a qualified retirement plan under § 401(a) of the Internal Revenue Code. The CFC Plan contained the antialienation clause required by 26 U.S.C. § 401(a)(13)(A) and 29 U.S.C. § 1056(d)(1).

Creasy brought a district court action culminating in court approval to terminate the CFC Plan. See Creasy v. Coleman Furniture Corporation, 763 F.2d 656 (4th Cir. 1985). Of approximately 400 CFC Plan participants, all except Shumate have

received final termination distributions from Creasy. (Pet. App. 4a). Upon satisfying all payments to plan participants, the surplus in the CFC Plan (commonly called a plan reversion) was paid to the CFC bankruptcy estate.

The Trustee, pursuant to 11 U.S.C. § 542, filed an Adversary Proceeding in the United States Bankruptcy Court on April 24, 1987, for the turnover of Shumate's CFC Plan benefits to his bankruptcy estate. Shumate responded by filing a motion in an existing United States District Court civil action concerning the CFC Plan, to compel Creasy to pay the benefits over to him. The Trustee intervened in this action, into which the Adversary Proceeding was consolidated, and the district court heard all matters relating to Shumate's CFC Plan interest.

Shumate, Creasy, and the Trustee

entered into an Agreed Order dated December 3, 1987, fixing Shumate's CFC Plan interest at $250,000.00. (J.A. 92, Vol. I). Creasy then paid the funds to the Clerk of the district court to hold in an interest bearing account.

The Trustee argued at trial that Shumate's CFC Plan interest was property of the bankruptcy estate under the broad reach of 11 U.S.C. § 541(a): "all legal and equitable interests of the debtor in property." Shumate contended the CFC Plan interest was excluded from § 541(a)[1] estate property because the CFC Plan's antialienation provision invoked the Employment Retirement Income Security Act of 1974 (ERISA) as an applicable nonbankruptcy law restriction on transfer

[1]All statutory references hereinafter are to Title 11 of the United States Code (the Bankruptcy Code) unless noted otherwise.

under § 541(c)(2). In the alternative, Shumate contended the CFC Plan interest was exempt from the Trustee's reach under § 522(b)(2)(A), claiming ERISA as a federal exemption.

The district court, interpreting Fourth Circuit precedent, held that applicable nonbankruptcy law means state law (Pet. App. 26a) and not a broad reference to other law such as ERISA. The district court reviewed Virginia spendthrift trust law and determined such trusts are invalidated as to a debtor who exercises control over the trust because he is, in effect, both settlor and beneficiary by virtue of the power to terminate the trust. (Pet. App. 35a, 36a).

Due to Shumate's pervasive control and revocation power over the CFC Plan and his interest in it, the court concluded he was effectively settlor and beneficiary and

without spendthrift trust protection. Accordingly, the district court held Shumate's pension interest was not excluded from the bankruptcy estate under § 541(c)(2). (Pet. App. 38a).

The district court also determined that the antialienation clause in the CFC Plan did not create an ERISA exemption under § 522(b)(2). Finding Virginia had opted out of the Bankruptcy Code's federal exemption scheme in § 522(d), the district court followed a line of court of appeals decisions holding ERISA was not intended by Congress to be a "federal exemption" under § 522(b)(2). (Pet. App. 42a - 44a).

The Fourth Circuit, in a decision dated August 12, 1991, held that "applicable nonbankruptcy law" under § 541(c)(2) does include ERISA and reversed the district court. Citing

Anderson v. Raine (In Re Moore), 907 F.2d

1476 (4th Cir. 1990) as authority, the court of appeals ruled that the antialienation language required by 29 U.S.C. § 1056(d)(1) in a qualified pension plan like the CFC Plan, is applicable nonbankruptcy law which excludes Shumate's pension interest from his bankruptcy estate. In the Fourth Circuit's view, there was no public policy exception to this ERISA protection regardless of the degree of control a debtor may have over his retirement plan interest. (Pet. App. 11a, 12a). Having found the controlling role of ERISA as applicable nonbankruptcy law under § 541(c)(2) to exclude a debtor's pension interest from his bankruptcy estate, the Fourth Circuit did not reach the question of whether ERISA creates an exemption in bankruptcy under § 522(b)(2)(A).

SUMMARY OF ARGUMENT

This case is before the Court to resolve whether a debtor in bankruptcy, with control over and the power to revoke a pension plan, can exclude or exempt his interest in such a plan from his bankruptcy estate.

The Fourth Circuit reads applicable nonbankruptcy law in § 541(c)(2) to cover all laws, including ERISA, so as to exclude a debtor's pension benefits from his bankruptcy estate without reference to the Bankruptcy Code's exemption provision, § 522. This interpretation ignores the plain language of § 522(d)(10)(E) and has the effect of writing that section out of the Bankruptcy Code.

Applicable nonbankruptcy law in § 541(c)(2) is more appropriately limited to state spendthrift trust law. Neither § 541 or its legislative history reference an ERISA exclusion for pension benefits from

the bankruptcy estate. By contrast, the Senate and House Reports describing § 541(c)(2) refer only to continuing over the existing practice to exclude spendthrift trusts under state law.

Congress dealt with a debtor's pension plan rights in the Bankruptcy Code with clear language in § 522(d)(10)(E) as a matter of exemption. This section specifically describes ERISA benefits as an exemption limited to the debtor's reasonable needs. The Fourth Circuit's view of § 541(c)(2) effectively voids this limitation and preempts the operation of § 522(d)(10)(E).

Section 541(a) and its legislative history describe property of the bankruptcy estate with an all inclusive scope containing the debtor's property rights. The Fourth Circuit's reading of ERISA as a § 541(c)(2) exclusion thwarts the federal

interest in an expansive inclusion of property in the bankruptcy estate and does not comport with the legislative history of the Bankruptcy Code.

The view that ERISA plan benefits are an estate exclusion under § 541(c)(2) does not appear to follow the rule for changes in preCode practice stated in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986). The preCode practice noted in the legislative history is an exclusion from the estate for spendthrift trusts. This should not be expanded to include ERISA trusts unless there is clear language in the Bankruptcy Code to do so.

In addition, if ERISA is applicable nonbankruptcy law under § 541(c)(2), it would partially invalidate § 541(a) and supercede § 522(d)(10)(E); a result prohibited under 29 U.S.C. § 1144(d).

The Fourth Circuit's view that applicable nonbankruptcy law in § 541(c)(2) is a plain term which must include ERISA is erroneous. The clear language of § 522(d)(10)(E) contradicts such a view. To follow the legislative history, harmonize § 541(c)(2) and § 522(d)(10)(E) and follow the federal preemption rule of 29 U.S.C. § 1144(d), applicable nonbankruptcy law should be limited to state spendthrift trust law.

The argument remains as to whether ERISA, by its own force, creates an omnibus bankruptcy exemption under § 522(b)(2)(A). The legislative history and § 522(d)(10)(E) reflect no such all inclusive exemption.

Section 522(b)(2)(A) covers debtor exemptions in states which "opt out" of the specific exemption in § 522 for ERISA pension benefits limited to a debtor's reasonable needs. If ERISA acts as an

omnibus federal law exemption for pension benefits under § 522(b)(2)(A), then § 522(d)(10)(E) would be preempted and rendered superfluous. This result is difficult to reconcile for the one statutory provision where Congress directly addresses ERISA benefits in the Bankruptcy Code.

As difficult to justify is the ancillary argument that an ERISA exemption exists only in the § 522(b)(2)(A) opt out states, thereby creating an inconsistent set of <u>federal</u> pension exemptions: a total exemption in opt out states and a "reasonable needs" exemption in all others.

The legislative history of § 522 contains no mention of ERISA as an omnibus, all inclusive federal bankruptcy exemption.

Regardless of the Court's decision on the § 541(c)(2) and § 522(b)(2)(A) questions, there should be an overriding

equitable exception to ERISA protection in bankruptcy for a debtor who controls his pension plan and can revoke it at will. In effect, no trust exists as to him and he should not be protected from the bankruptcy trustee.

The Fourth Circuit's decision should be reversed and the Trustee vested with the CFC Plan benefits as nonexempt property of the Shumate bankruptcy estate.

ARGUMENT

I. "Applicable nonbankruptcy law" under § 541(c)(2) is limited to state spendthrift trust law and does not include ERISA.

A. Background

This case reflects the deadlock existing in the courts of appeal over whether a bankruptcy debtor's interest in an ERISA qualified retirement plan becomes part of his bankruptcy estate and available

for distribution to creditors. The answer involves resolution of conflicting provisions in the Bankruptcy Code and ERISA.

ERISA requires that "each pension plan shall provide that benefits provided under the Plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13)(A).[2] This Court has barred creditors' claims to a debtor's pension interest outside of bankruptcy, citing the 29 U.S.C. § 1056(d)(1) requirement. Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680 (1990).

This Court has not addressed the issue as to whether ERISA's antialienation requirement acts to thwart the trustee in bankruptcy as it would a creditor acting

[2]Hereinafter citations to 29 U.S.C. § 1056(d)(1) will be deemed to include its statutory twin, 26 U.S.C. § 401(a)(13)(A).

under a nonbankruptcy claim. Particularly relevant to this inquiry is 29 U.S.C. § 1144(d), which appears to subordinate ERISA provisions conflicting with other federal law: "Nothing in this title shall be construed to alter, amend ... or supercede any law of the United States."

Four years after enacting ERISA, Congress repealed the Bankruptcy Act of 1898 with the Bankruptcy Reform Act of 1978 placing the Bankruptcy Code as Title 11 of the U.S. Code. Under the old Act, property of a debtor subject to the reach of his creditors in bankruptcy depended on whether a particular asset was either in alienable or leviable form. Segal v. Rochelle, 382 U.S. 375, 379 (1966). Under the new Code all the debtor's property comprises an estate in bankruptcy under § 541(a): "all legal or equitable interests of the debtor in property." Congress intended § 541(a)

to have a broad scope:

> because it includes as property of the estate all property of the debtor even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. § 522.[3]

A debtor's bankruptcy exemptions depend on the debtor's state of residence. Under § 522(b)(1), a state may permit debtors to select the "federal exemptions" provided in § 522(d), or may "opt out" thus limiting debtor exemptions to those permitted under § 522(b)(2)(A). Virginia has opted out of § 522(d). Va. Code § 34-3.1 (1990).

Section 541(c)(2) is an adjunct to the system of first including all the debtor's

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[3]S. Rep. No. 95-989, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5868; and H.R. Rep. No. 95-595, 95th Cong., 2nd Sess., reprinted in 1978, U.S. Code Cong. & Admin. News 5963, 6324.

property in the bankruptcy estate under § 541(a) and then permitting particular exemptions under § 522. It provides an exclusion for assets which have "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law."

This Court granted certiorari, in part, to resolve whether ERISA is applicable nonbankruptcy law under § 541(c)(2). Courts have taken four different roads to answer this query.

Three courts of appeal follow the Fifth Circuit's decision, Goff v. Taylor, 706 F.2d 574 (1983), holding applicable nonbankruptcy law is limited to state spendthrift trust law. Daniel v. Security Pacific National Bank, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 106 S. Ct. 1199; Lichstrahl v. Bankers Trust, 750 F.2d 1488

(11th Cir. 1985); Regan v. Ross, 691 F.2d 81 (2nd Cir. 1982).[4] In these circuits a debtor's pension interest is excluded from the estate if the pension trust qualifies as a spendthrift trust under state law.

The Eighth Circuit in Samore v. Graham, 726 F.2d 1268, 1272 (1985), took a second road to determining that all ERISA plans are part of the estate, subject only to the exemption provisions of § 522.

Four other circuits disagree, holding § 541(c)(2) is not limited to state spendthrift trust law, but includes ERISA. Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990); In re Lucas, 924 F.2d 597 (6th Cir. 1991); Velis v. Kardanis, 949 F.2d 78 (3rd Cir. 1991); and Gladwell v. Harline, 950 F.2d 669 (10th Cir. 1991). These courts of appeal sanction an omnibus

[4]Regan v. Ross involved a government plan not covered under 26 U.S.C. § 401(a).

§ 541(c)(2) ERISA exclusion from the bankruptcy estate for a debtor's pension interest without reference to the § 522 exemptions.

A few bankruptcy courts take yet a fourth road holding that applicable nonbankruptcy law in § 541(c)(2) is limited to state spendthrift trust law, but finding an omnibus ERISA exemption in bankruptcy. These decisions deem ERISA a "federal exemption" in § 522(b)(2)(A). In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989). This approach is another issue for which certiorari was granted and is discussed in Section II infra.

The Trustee contends the Fifth Circuit's approach in Goff is the correct road.

B. The plain meaning of § 522(d)(10)(E) contradicts reading "applicable nonbankruptcy law" in § 541(c)(2) to include ERISA, which would effectively render § 522(d)(10)(E) superfluous.

This Court's initial decision is whether the Fourth Circuit's delineation of applicable nonbankruptcy law is correct:

> applicable nonbankruptcy law means precisely what it says: All laws state and federal under which a transfer restriction is enforceable. Nothing in the phrase applicable nonbankruptcy law suggests that the phrase refers exclusively to state law, much less the state spendthrift trust law. (Pet. App. 7a, 8a).

Is applicable nonbankruptcy law a plain term of art not subject to explanation or construction?

This underlying premise of the Fourth Circuit's opinion should be rejected from the outset. It contradicts the unmistakably plain dictate of Congress in § 522(d)(10)(E) to cover ERISA benefits as exemptions and contravenes the principle of

statutory construction against interpreting § 541(c)(2) so as to render § 522(d)(10)(E) nugatory.

Statutes should be read as a whole and not in isolated parts. United States v. Morton, 467 U.S. 826 (1984). Section 522(d)(10)(E) exists to specifically exempt "a debtor's right to receive ... a payment under a ... pension ... plan ... to the extent reasonably necessary for the support of the debtor ... unless ... such plan ... does not qualify under ... 26 U.S.C. § 401(a)".

Congress could not be any more to the point. A debtor's rights to a pension benefit, choate or inchoate, are a matter of exemption from the bankruptcy estate. In order to reach the application of an exemption, the plan benefit rights must first be included in the estate under § 541(a) in order for a § 522 exemption to be

effective.

The legislative history of the Bankruptcy Code is unequivocal that all of a debtor's interests be first included in his estate under § 541(a) and then subject to exemptions.

> The bill determines what is property of the estate by a simple reference to what interests in property the debtor has at the commencement of the case. This includes all interests ... whether or not transferrable by the debtor ... (emphasis added). These changes [from prior law] will bring anything of value that the debtors have into the estate. The exemption section will permit an individual debtor to take out of the estate that property that is necessary for a fresh start.[5]

The Commission on the Bankruptcy Laws of the United States, which prepared the draft statute which became the Bankruptcy

[5] H.R. Rep. No. 95-595, 95th Cong., 2d Sess. reprinted in U.S. Code Cong. & Admin. News 5963, 6136.

Reform Act of 1978 including § 522, described ERISA benefits as a specific subject for exemption.

> Benefits or rights under a retirement plan are exempt under clause (6) if the plan is qualified under I.R.C. §401(a). A limit is placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits.[6]

Reading § 522(d)(10)(E) with § 541(c)(2) negates a conclusion that ERISA creates an exclusion from the estate by its own force under § 541(c)(2). It is a consequence unlikely to be inferred from a Congress which specifically describes ERISA benefits in § 522, but with nary a mention of ERISA in § 541 or its legislative history. The Fifth Circuit in Goff, 706

[6]Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 93d Cong., 1st Sess., reprinted in Collier on Bankruptcy, Appendix 2, p.129 (15th ed.)

F.2d 574, 582, concluded:

> Congress did not intend to do ambiguously in Section 541 that which it clearly did not do directly in Section 522, although Section 522 explicitly addresses the extent to which other "Federal law" and retirement benefit exemptions would be recognized.

The Fourth Circuit's construction of an omnibus ERISA exclusion through § 541(c)(2) conflicts with the principle recognized by this Court of "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Freytag v. C.I.R., 111 S. Ct. 2631, 2638 (1991). Pennsylvania Department of Public Welfare v. Davenport, 110 S. Ct. 2126, 2133 (1990).

The drafters of the Bankruptcy Code crafted a limited exemption for pension benefits in those states using the § 522(d)(10)(E) exemption. The Fourth Circuit's view renders this Section an

effective nullity. If the omnibus ERISA exclusion posited by the Fourth Circuit for §541(c)(2), stands, the clear limitations of "reasonable needs of the debtor" for debtor pension benefits in non opt out states will be void. The § 541(c)(2) exclusion will have pre-empted the plain intent of § 522(d)(10)(E); a result Congress did not intend. Further, the Bankruptcy Code's distinction between exemptions allowed under § 522(b)(2)(A) (in "opt out" states like Virginia) and those in states using the federal exemptions under § 522(d)(10)(E) would be moot if there is a superseding § 541(c)(2) exclusion taking pension benefits out of the estate before the exemption section comes into play.

As the Bankruptcy Commission report indicated above, the proposed exemption applied to benefits in ERISA plans

qualifying under § 401(a) of the Internal Revenue Code, like the CFC Plan, (as well as individual Retirement Accounts (Internal Revenue Code § 408(a) (IRC) and Employee stock ownership plans (IRC § 409)). It is these retirement plans in which deductions for employer contributions and the tax free accrual of income to the beneficiary are conditioned on the plan containing the ERISA antialienation provision. While certain charitable annuities, for which no antialienation clause is required, (IRC § 403(b)) could still be covered by § 522(d)(10)(E), the statute's intended purpose for the vast majority of private pension arrangements would be nil. Ascribing such a convoluted purpose to Congress, with the specific listing of plans covered in § 522(d)(10)(E)(iii), is difficult to fathom.

The Tenth Circuit, <u>Gladwell v.</u>

Harline, 950 F.2d 669 (1991) and the Third Circuit, Velis v. Kardanis, 949 F.2d 78, 181 (1991), opine that a § 541(c)(2) omnibus ERISA exclusion from the bankruptcy estate does not render § 522(d)(10)(E) superfluous by conjuring § 522 is to deal with an actual distribution from a pension plan as opposed to the debtor's rights in a pension plan. This argument ignores the plain language of § 522 and attempts to create a distinction which does not exist.

Section 522(d)(10) clearly covers a debtor's "right to receive" a distribution under a subsection E pension plan. That is exactly what the Trustee seeks to include in the Shumate estate: the right to the CFC Plan benefits. Section 522(d) makes no distinction between payments being made to a debtor and the debtor's other rights to the funds whether present or future. Surely the legislative history of the

Bankruptcy Code would describe such a bifurcated scheme for a debtor's pension interests, if one were to exist, but no mention is found in the House or Senate Reports, much less the statute.

Applicable nonbankruptcy law should not be read to include ERISA in § 541(c)(2). To do so ignores the plain language of the Bankruptcy Code dealing with ERISA benefits as a matter of exemption under § 522(d)(10)(E) and by implication, § 522(b)(2)(A). The Fourth Circuit's view would also render § 522(d)(10)(E) essentially superfluous, contrary to the rules of statutory construction.

C. "Applicable nonbankruptcy law" is an ambiguous term requiring further examination to establish proper application in § 541(c)(2).

This Court has recognized there can be substantial ambiguity in similar terms used within the same Bankruptcy Code section, thus requiring more than a cursory reading of a term like applicable nonbankruptcy law. Dewsnup v. Timm, No. 90-741, 60 U.S.L.W. 4111, 4113 (decided January 15, 1992). Applicable nonbankruptcy law is a nebulous term, inherently ambiguous, particularly when taken in the context of the interplay of § 541 and § 522. As this Court indicated in King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991), "the meaning of statutory language, plain or not, depends on context."

Applicable nonbankruptcy law is not explained in the Bankruptcy Code definitional statute, § 101. In sections other than § 541(c)(2), its meaning is malleable according to the context. Applicable nonbankruptcy law appears at §

1125(d) (regarding securities law for disclosure statements) and § 108 (regarding statutes of limitation) where it can be read to include federal and state law. Based on the maxim "a word is presumed to have the same meaning in all subsections of the same statute," the Fourth Circuit concluded applicable nonbankruptcy law must mean federal and state law throughout the Bankruptcy Code. In re Moore, 907 F.2d 1476, 1478.

That conclusion ignores applicable nonbankruptcy law is limited to state law in other Bankruptcy Code sections. For instance, § 522(b)(2)(B) exempts tenancy by the entireties property under applicable nonbankruptcy law from the bankruptcy estate. Only state law defines such tenancies in property. There is no federal law to do so. Applicable nonbankruptcy law is here clearly limited to state law.

This dichotomy, with differing meanings for the same term within related sections of the Bankruptcy Code, justifies further inquiry to determine the intended scope for applicable nonbankruptcy law under § 541(c)(2).

In United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 243 (1989), this Court discussed the need for further inquiry if the apparent literal application of a statute produced a result at odds with the intention of the drafters. Assuming solely for the purposes of argument that applicable nonbankruptcy law in § 541(c)(2) is a "plain" term encompassing all law, state and federal, this inquiry is in order where such a reading conflicts with:

1. other sections of the Bankruptcy Code (§ 541(c)(2) and 522(d)(10)(E)); or

2. an important federal interest (the

intended broad inclusion of assets in the bankruptcy estate); or

3. where a contrary view is shown by the legislative history.

All three circumstances are present in this case. If ERISA is applicable nonbankruptcy law under § 541(c)(2), a conflict exists with § 522(d)(10)(E) as described above.

Finding a comprehensive ERISA exclusion under § 541(c)(2) also frustrates a key purpose of the Bankruptcy Code: to include all assets of the debtor in the bankruptcy estate with exemptions later determined.[7] This Court has recognized the importance of this inclusive scope for the bankruptcy estate. United States v. Whiting Pools, 462 U.S. 198, 204 (1983). The omnibus ERISA exclusion advocated by

[7]See supra notes 3, 5.

the Fourth Circuit for § 541(c)(2) contravenes this federal interest in an expansive bankruptcy estate.

Senate and House Reports accompanying the Bankruptcy Reform Act narrowly focus any exclusion under 541(c)(2) to one which "preserves restrictions on transfer of a spendthrift trust".[8] The House Report is very direct:

> The bill also continues over the exclusion of property from the estate of the debtor's interest in a spendthrift trust to the extent that the trust is protected from the creditors under applicable <u>state</u> law."[9]

It seems unmistakable from the legislative history that, but for the

[8]H.R. Rep. No. 95-595, 95th Cong. 2d Sess., <u>reprinted in</u> U.S. Code Cong. & Admin. News 5963, 6325; and S. Rep. No. 95-989, 95th Cong., 2d Sess., <u>reprinted in</u> U.S. Code Cong. & Admin. News 5787, 5869.

[9]H.R. Rep. No. 95-595, 95th Cong. 2d Sess. <u>reprinted in</u> U.S. Code Cong. & Admin. News 5963, 6136.

exemptions permitted under § 522, Congress intended only a narrow exclusion from the estate limited to the preCode practice for spendthrift trusts under state law.

Even if applicable nonbankruptcy law in § 541(c)(2) could be initially read with the "plain meaning" the Fourth Circuit asserts, the Trustee, nevertheless, has met the test for further inquiry under <u>Ron Pair Enterprises, Inc.</u>. Interpreting applicable nonbankruptcy law as state spendthrift trust law eliminates the conflict between § 541(c)(2) and § 522(d)(10)(E), affirms the congressional intent for an expansive scope to the bankruptcy estate under § 541(a), and comports with the legislative history of the Bankruptcy Code.

D. An all encompassing ERISA exclusion from the bankruptcy estate is a variance from preCode practice without clear

congressional intent for such a change.

This Court has enunciated a rule of construction in bankruptcy cases where an interpretation of the Bankruptcy Code purports to change preCode practice. Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986). Justice O'Conner described the rule in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 252 (1989).

> The rule of Midlantic is that bankruptcy statutes will not be deemed to have changed preCode law unless there is some indication that Congress thought it was effecting such a change.

While there appear to be no cases between the enactment of ERISA in 1974 and the Bankruptcy Code in 1978, which deal with ERISA trusts under the Bankruptcy Act,

the legislative history of the Bankruptcy Code describes preCode practice in terms of state law spendthrift trusts.

The new Code "continues over"[10] the existing practice limited to spendthrift trusts. This preCode protection honored the wishes of the settlor of a trust who wished to provide for a beneficiary otherwise unable to care for his assets: "The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust."[11]

Finding a preCode practice as to spendthrift trusts meets the first half of the Midlantic test. "The second step under Midlantic is to look for some indicia that Congress knew it was changing preCode law."

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[10] See Supra notes 7, 8.

[11] See supra, note 9.

Ron Pair Enterprises, Inc., 489 U.S. 235, 254.

The Bankruptcy Code and ERISA are silent as to any plain statutory directive that ERISA is to be deemed spendthrift trust law for purposes of an estate exclusion. The legislative histories of both statutes are devoid of a description manifesting a congressional intent to change preCode practice to include ERISA within the ambit of the "continued over" spendthrift trust protections. If expanding the narrow exclusion from the bankruptcy estate for spendthrift trusts to include ERISA was intended, surely the legislative history would make some reference to such a change for the new Code.

E. The Bankruptcy Code overrides a conflicting ERISA provision under 29 U.S.C. § 1144(d).

ERISA's state law pre-emption provision, 29 U.S.C. § 1144(a), is offset by a collorary in 29 U.S.C. § 1144(d) regarding federal law:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States....

Section 541(a) reflects the congressional intent to include all of a debtor's assets in his bankruptcy estate even if the debtor is restricted in his ability to transfer such property.[12] The debtor's trustee in bankruptcy acquires entitlement to the debtor's property, subject to any § 522 exemptions. In this case, the Trustee steps into Shumate's entitlement to the lump sum distribution from the terminating CFC Plan. To hold 29

[12] See supra note 8.

U.S.C. § 1056(d)(1) as a bar to inclusion of Shumate's pension benefits in his bankruptcy estate would be to write in a bankruptcy exception to 29 U.S.C. § 1144(d) which does not exist.

Shumate may argue that <u>Guidry v. Sheet Metal Workers National Pension Fund</u>, 110 S.Ct. 680, rejected a 29 U.S.C. § 1144(d) claim regarding a debtor's pension interest under 29 U.S.C. § 501, the Labor Management Relations Act (LMRA), and should control in this case. Such an argument is defective.

<u>Guidry</u> dealt with a claim in a <u>nonbankruptcy</u> setting. The creditor's (a labor union) claim was for an equitable constructive trust for that creditor on the defalcating former union official's pension entitlements based on the LMRA's authorization of a cause of action for the benefit of a labor organization. This Court saw the cause of action granted under

LMRA as unmodified by the pension plan's ERISA required antialienation provision limiting recovery out of the pension plan. The LMRA provision was too general to be altered or amended by the ERISA antialienation bar which applies, outside bankruptcy, to stop collection of a judgment, but does not cut off the cause of action to obtain a judgment. Accordingly, there was no conflict between the LMRA and 29 U.S.C. § 1144(d).

Significantly, this Court declined to rule on whether 29 U.S.C. § 1109(a), which requires a faithless pension plan fiduciary "to make good to such plan any losses" supercedes the bar on alienation under 29 U.S.C. § 1056(d)(1).

The case at bar, by contrast, does involve bankruptcy. The inclusive scope of § 541(a), unlike the general right to a cause of action in the LMRA, does conflict

with 29 U.S.C. § 1056(d)(1). The ERISA provision is sublimated to § 541(a) or else it will impair and supercede the Bankruptcy Code's provision for a bankruptcy estate inclusive of all the debtor's property rights. That the Bankruptcy Code was adopted after ERISA makes it more difficult to argue § 541(a) should give way to 29 U.S.C. § 1056(d)(1). See Sutherland Stat. Const. § 51.02 (5th ed.).

The protection from creditors for ERISA benefits, which is available outside bankruptcy, is one of the property rights a debtor surrenders to his trustee when he decides to take the benefits afforded him by filing bankruptcy.

F. The applicable nonbankruptcy law, Virginia spendthrift trust law, does not afford Shumate's CFC Plan benefits protection from the Trustee.

The district court's determination that Virginia spendthrift trust law did not protect Shumate's CFC Plan benefits from the Trustee is sound. With 96% of the CFC stock, Shumate could appoint the corporate directors (or change the corporate structure) at anytime, without cause or limitation, thus directing termination of the CFC Plan at will. (J.A. 157, Vol. I, and 475, Vol. II). Shumate would receive not only his own account interest (by far the largest in the CFC Plan), but the value of the plan reversion.

The district court, uncontradicted by the Fourth Circuit, determined Virginia law would not honor spendthrift protection with Shumate's dominion and control over the CFC Plan. (Pet. App. 30a - 38a). In re O'Brien, 50 B.R. 67 (B.C.E.D. Va. 1985); Petty v. Moores Brook Sanitarium, 110 Va. 815, 67 S.E. 355 (1910). Shumate's

unfettered control over the CFC Plan vitiates the intended protection of a spendthrift (antialienation) provision as he in effect becomes settlor and beneficiary through his revocation powers.

Shumate's claim that the NCNB loan agreement abrogated his control over the CFC Plan is without merit. The agreement was with CFC, not the CFC Plan. Once the CFC Plan was terminated, Shumate would have received the benefit of the value of the plan reversion either as an increase in the value of his equity or a diminution of his obligation to NCNB. Even if the restriction on dividends were applicable, it would simply extend a lump sum dividend to Shumate into payments over several years. Moreover, as the district court observed: "Shumate would be estopped from asserting an act of his own will as a bar to an exercise of power he lawfully

possessed. <u>See</u> Restatement (Second) Agency § 8B (1934)." (Pet. App. 40a, 41a).

Applicable nonbankruptcy law in § 541(c)(2) is limited to state spendthrift trust law. The applicable law of Virginia voids any spendthrift protection Shumate might otherwise enjoy because of his revocation power over the CFC Plan.

II. ERISA does not create a federal exemption in bankruptcy under 11 U.S.C. § 522(b)(2)(A).

The Fourth Circuit declined to render an opinion on whether ERISA constitutes a federal exemption under § 522(b)(2)(A) so as to categorically exempt pension benefits in an ERISA qualified plan from the debtor's bankruptcy estate. (Pet. App. 16a). The Third, Fourth, Sixth and Tenth Circuits omitted decision on this question as their determination that ERISA was an applicable nonbankruptcy exclusion under §

541(c)(2) made the query moot. Assuming, however, this Court concurs with the Trustee that applicable nonbankruptcy law under § 541(c)(2) does not include ERISA, the exemption question is to be resolved.

Section 522(b)(2)(A) provides that a debtor may exempt "any property that is exempt under federal law, other than subsection (d) of this section, or state ... law ...." Shumate may argue that ERISA's antialienation provision, 29 U.S.C. § 1056(d)(1), creates a barrier to creditors outside bankruptcy and since this barrier is erected by a federal statute, it should follow this is a federal exemption.

The Trustee believes no omnibus ERISA exemption exists under § 522(b)(2)(A). Such an exemption would either render § 522(d)(10)(E) without a purpose or create inconsistent federal pension exemptions in bankruptcy. It is also contrary to the

legislative history of § 522.

To read an ERISA exemption into 11 U.S.C. § 522(b)(2)(A) only would make the provision for pension exemptions within the statute inconsistent. There would be two federal law pension exemptions: a complete exemption in "opt out" states and a reasonable needs exemption in others. This seems an unlikely course, particularly since § 522 is written to provide a single set of federal exemptions unless a state elects otherwise as both floor leaders for the Bankruptcy Reform Act, Representative Don Edwards and Senator Dennis DeConcini, explained.[13]

If Shumate was a resident of a non optout state, so as to be restricted to the

[13]H.R. Rep. No. 95-595, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6436, 6455, and S. Rep. No. 95-989, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6505, 6521.

exemptions under § 522(d), his CFC Plan benefit would be exempt only "to the extent reasonably necessary for the support of the debtor ...." If ERISA creates an omnibus exemption, then the § 522(d) reasonable needs limitation would be ineffective. If ERISA is "federal law" and creates a full exemption under 11 U.S.C. § 522(b)(2), how can that be squared with the clear limitation on ERISA benefits for the debtor who is restricted to the § 522 exemptions? The reconciliation is that ERISA is not one of the intended federal exemptions in bankruptcy under § 522(b)(2)(A).

The legislative history of the Bankruptcy Reform Act does not describe an all encompassing ERISA exemption in § 522. On the contrary, the House and Senate Reports list federal exemptions for §

522(b), but ERISA is omitted.[14] The included statutory exemptions, such as social security payments, all contain specific statutory prohibitions against alienation. In contrast, ERISA provides that the pension plan trust contain an antialienation clause; it does not state a direct statutory prohibition.

The Fifth Circuit, by strong _dicta_ in _Goff_, 706 F.2d 574, 585 (1983), critically reviewed what Congress intended for § 522(b)(2)(A).

> The failure of Congress to include ERISA in its listing of illustrative federal statutes is highly probative of congressional intent that ERISA was not within the group of "federal law" based exemptions... Congress knew of the previously-enacted ERISA when drafting Section 522(b)(2)(A), yet neither the House nor the Senate deemed fit to include it within their

[14]S. Rep. No. 95-989, _supra_, at 5861, and H.R. Rep. No. 95-595, _supra_ at 6316.

> respective illustrative lists, Congress did refer to ERISA where it wanted to do so in other provisions of the Code. Of similar relevance is the specific reference in another subsection of Section 522 itself to the very ERISA provision relied upon by appellants as constituting a "Federal law" exemption... Certainly, therefore, Congress did not "overlook" ERISA. Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes. The often-stated admonition that it may be treacherous to attach great weight to congressional silence in interpreting its laws does not apply in this case in light of the comprehensive consideration of this issue which is revealed by this history....

Section 522 contemplates a state law determination of exemptions. To read a federal ERISA exemption into § 522(b)(2)(A) would either render § 522(d)(10)(E) superfluous or establish an inconsistent

set of federal law pension exemptions. Combined with the persuasive legislative history that omits ERISA as a federal exemption, it seems apparent there is no omnibus ERISA exemption in bankruptcy under § 522(b)(2)(A).

III. Longstanding public policy prohibits a trust beneficiary with dominion, control and the right to terminate the trust in which he has an interest, from sheltering that asset from his creditors.

In McLean v. Central States Pension Fund, 762 F.2d 1204, 1207 (1985), the Fourth Circuit appeared to endorse the proposition of an overriding public policy which could void the antialienation protection of a debtor's retirement interest in bankruptcy.

> The pension fund is not one of those which because settled and revocable by a beneficiary, may

not on that account for public policy reasons be protected against the claims of the beneficiary's creditors by antiassignment provisions.

The district court below relied on this public policy, citing McLean, that a trust beneficiary with control so as to revoke a trust at will and receive the assets would not be protected from his creditors. (Pet. App. 29a). Shumate had that type of all pervasive control which Virginia spendthrift trust law would not protect. In such cases, the district court determined, "Public policy demands that debtors not be allowed access to their funds to the detriment of creditors." (Pet. App. 36a).

Although the Court declined to make an equitable exception in Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680, 687 (1990), to the nonbankruptcy protection offered by 29 U.S.C. §

1056(d)(1), the effectively self settled trust is a different case.

The debtor's control and revocation power strikes at the heart of antialienation protection ERISA purports to give. In reality no trust exists as to Shumate as it is in his total discretion to keep or revoke the trust. The Guidry protection should not apply where the trust is effectively a sham as to the debtor.

Otherwise, debtors like Shumate can manipulate retirement funds which they can drain of assets to the exclusion of creditors once bankruptcy is filed. There is no requirement Shumate use any of the funds from the CFC Plan for retirement; he can use the funds as he wishes. It seems unlikely Congress would draw ERISA to protect retirement, craft the Bankruptcy Code as all inclusive of a debtor's property, but yet allow a debtor like

Shumate to control and direct a large retirement fund which he could exempt from creditors and then use upon termination as he so chooses.

CONCLUSION

The Fourth Circuit's decision should be reversed. Applicable nonbankruptcy law in § 541(c)(2) is a reference to state spendthrift trust law and does not confer the protection of ERISA's antialienation bar on a debtor in bankruptcy. The applicable state law of Virginia does not approve spendthrift trust protection for a debtor, like Shumate, who had complete dominion, control and revocation power over the trust for his benefit.

Shumate's interest in the CFC Plan is not exempt under § 522(b)(2)(A). ERISA does not constitute a stand alone federal exemption in bankruptcy. Finally, Shumate's interest in the CFC Plan should

be an equitable exception to the antialienation requirement of ERISA because Shumate is effectively the settlor and beneficiary of the trust through his revocation power over it.

The Trustee respectfully submits that the decision of the Court of Appeals be reversed and judgment entered in favor of the Trustee that he is entitled to Shumate's CFC Plan benefits as a nonexempt asset of the bankruptcy estate.

Respectfully submitted,

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No. 91-913

In The

Supreme Court of the United States

October Term, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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STATEMENT OF THE CASE

This appeal concerns the ownership interest of Mr. Joseph B. Shumate, Jr., the Respondent ("Shumate"), in the Coleman Furniture Corporation Pension Plan (the "Plan"). Shumate is 62 years old and is presently unemployed. The retirement benefits that would be due to him under the Plan are necessary for his livelihood. Shumate has not been able to afford counsel and has proceeded *in forma pauperis* at each stage of these proceedings. The Petitioner, Mr. John R. Patterson ("Patterson"), is the duly appointed and acting trustee-in-bankruptcy for the bankruptcy estate of Shumate. Patterson has asserted a claim on behalf of the bankruptcy estate against Shumate's interest in the Plan. Patterson seeks to collect Shumate's pension and administer it for the benefit of Shumate's creditors.

In 1963, Coleman Furniture Corporation ("Coleman") established the Plan to provide retirement income protection for the benefit of its eligible employees and their beneficiaries. J.A., Vol. II, p. 191. The Plan was funded solely by contributions from Coleman. J.A., Vol. II, p. 312. The Plan was amended from time to time to assure compliance with changes in applicable laws. The Plan contains an anti-alienation provision as required by ERISA.[1] J. A., Vol. II, p. 342. Shumate was one of approximately 400 participants in the Plan at the time the controversy arose involving Shumate's interest in the Plan. Pet. App., p. 3A.

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[1] The district court recognized that the Plan appeared to qualify as a spendthrift trust under Virginia law. Pet. App., p. 189.

Shumate worked for Coleman for over 30 years. He participated in the Plan as an employee from its inception. He worked his way up through the company until he became president of Coleman in 1979. He served in that capacity until Coleman was forced to file a bankruptcy petition under Chapter 11 of the Bankruptcy Code on November 3, 1982. J.A., Vol. I, p. 119. Shumate served as administrator of the Plan during his tenure as president. J.A., Vol. I, p. 120. The Plan had a separate, independent trustee. Coleman, not Shumate, was the settlor of the pension trust. Shumate had voting control of a majority of Coleman's stock beginning in 1978; however, Shumate never had unbridled control of Coleman's assets. J.A., Vol. I, p. 110-11. In fact, the Court of Appeals for the Fourth Circuit recognized that the "control" that Shumate had over Coleman was merely the potential for exerting control. Pet. App., p. 22. The control was never actually exercised by him.

In July 1983, Coleman's Chapter 11 bankruptcy case was converted to a proceeding under Chapter 7 of the Bankruptcy Code. Roy V. Creasy ("Creasy") was appointed trustee of Coleman's bankruptcy estate. J.A., Vol. I, pp. 90 and 12-13. As a result of the conversion of Coleman's bankruptcy case, Shumate began to experience financial difficulties. Almost a year later, in June, 1984, Shumate filed a voluntary petition under Chapter 11 of the Bankruptcy Code. After Shumate's case was converted to a proceeding under Chapter 7 of the Bankruptcy Code, Patterson was appointed the Chapter 7 trustee for Shumate's bankruptcy estate. J.A., Vol. I, pp. 90 and 18.

Following the filing of bankruptcy petitions by both Coleman and Shumate, the administration and status of the Plan became the subject of lengthy and protracted litigation. In connection with that litigation, Shumate, Creasy and Patterson agreed to establish the value of Shumate's interest in the Plan at $250,000 (the "settlement"). The settlement was approved by the district court by order dated December 3, 1987. J.A., Vol. I, pp. 92, 94. In the proceedings below, the parties stipulated that the terms of the 1976 Plan governed this case. J.A., Vol. I, pp. 90 and 12-13.

On April 24, 1987, Patterson filed an adversary proceeding in the United States Bankruptcy Court for the Western District of Virginia (the "Turnover Action"), to recover Shumate's interest in the Plan on behalf of Shumate's bankruptcy estate. On July 27, 1987, Shumate filed a motion in connection with a pre-existing proceeding that was pending in the United States District Court for the Western District of Virginia to compel Creasy, who was then serving as the Plan's administrator post-petition, to pay over Shumate's interest in the Plan to Shumate. J.A., Vol. I, pp. 7-10. Patterson intervened in the district court action because he claimed an interest in Shumate's Plan benefit. J.A., Vol. I, pp. 84-87. Patterson's Turnover Action was subsequently consolidated with the district court action. *Id.*

On December 16, 1987, the district court conducted a hearing to determine the entitlement to Shumate's interest in the Plan. J.A., Vol. I, p. 106. On February 29, 1988, the district court issued a memorandum opinion and order in which it denied Shumate's motion to compel. Pet. App., p. 186. On March 8, 1988, Shumate filed a

motion to reconsider and amend order. J.A., Vol. I, p. 4. The district court granted Shumate's motion; but, on reconsideration, the court found no basis to alter its February 29, 1988, order. The court affirmed its ruling and granted Shumate the right to take an interlocutory appeal. Pet. App., p. 478. The Court of Appeals denied the petition to appeal.

On June 29, 1988, Shumate filed a motion for a new trial, and on August 15, 1988, Patterson filed a motion for disbursement and final order. J.A., Vol. I, pp. 4-5 and 170. A hearing was conducted by the district court on September 1, 1988. On September 2, 1988, the district court granted Patterson's motion and issued a final order directing the payment of Shumate's interest in the Plan to Patterson for the benefit of Shumate's creditors pursuant to the district court's earlier ruling. J.A., Vol. I, p. 178. Shumate appealed from the September 2, 1988, order.

The Court of Appeals for the Fourth Circuit reviewed the case on informal briefs and thereafter decided to have the case formally briefed and argued. The court appointed the law firm of Maloney, Yeatts & Barr, A Professional Corporation, as counsel for Shumate and heard the case. By published decision, the Fourth Circuit reversed the ruling of the district court and held that Shumate's interest in the Plan was not property of his bankruptcy estate under Bankruptcy Code §541(c)(2). Pet. App. pp. 1a-11a. The appeal to this Court followed.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit in this case should be affirmed. The Fourth Circuit held that the plain language of Bankruptcy Code §541(c)(2) mandates that where trusts contain enforceable restrictions on the transfer of the beneficial interest, those restrictions must be recognized in bankruptcy and thereby operate to exclude the interest from the debtor's estate.

Upon the filing of a bankruptcy case, a bankruptcy estate is created by operation of Bankruptcy Code §541. Although this section broadly defines the content of the debtor's estate, it is recognized that certain property interests are excluded from it. Specifically, Bankruptcy Code §541(c)(2) excludes from the bankruptcy estate a debtor's interest in a trust which contains a restriction that is enforceable under "applicable nonbankruptcy law" on the transfer of the debtor's beneficial interest in the trust. The phrase "applicable nonbankruptcy law" is a broad term that refers to all laws, state and federal, under which a transfer restriction is enforceable. The phrase is not limited to state law but also embraces federal statutes such as the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

ERISA requires all qualified pension plans to include an anti-alienation provision. This provision imposes a restriction on the assignment and alienation of pension benefits. The purpose of the provision is to insure that the benefits under a qualified plan will actually be available to pensioners upon their retirement. The restrictions on

alienation demonstrate a strong public policy to safeguard retirement income for pensioners and their dependents. The anti-alienation provision required by ERISA is enforceable under applicable nonbankruptcy law. Because it imposes a restriction on the transfer of the beneficial interest that a debtor has in a qualified plan, the interest is excluded from the bankruptcy estate under Bankruptcy Code §541(c)(2).

Congress used the phrase "applicable nonbankruptcy law" to refer to both federal and state law in the Bankruptcy Code. There is no ambiguity in the phrase that would require the use of legislative history to interpret the phrase. A cardinal rule of statutory construction is that statutes should be read as a whole and that the same term should be given the same meaning throughout a statute. The term "applicable nonbankruptcy law" appears throughout the Bankruptcy Code, and at each occurrence the term refers to federal as well as state law. This interpretation is bolstered by Congress' use of the term "state law" in the Bankruptcy Code when a particular reference is limited only to state law.

Whenever possible, different federal laws should be read in harmony and not in conflict. The broad reading of the phrase "applicable nonbankruptcy law" utilized by the Fourth Circuit gives effect to both ERISA and the Bankruptcy Code. A major policy of ERISA is to protect the future pensions of individuals and to protect a stream of income for those individuals in their retirement. The anti-alienation provision of ERISA is integral to the accomplishment of this policy. A major policy of the Bankruptcy Code is to provide the debtor with a fresh start. By excluding ERISA qualified plan benefits from

the bankruptcy estate, both of these policies are preserved and advanced. Any exceptions to ERISA's anti-alienation provision should be left for Congress to implement.

Federal policy strongly supports the enforcement of ERISA's anti-alienation provision. This policy which has developed as a body of federal common law over the past 20 years consistently enforces ERISA's anti-alienation provision outside of the bankruptcy context. The Fourth Circuit's decision discourages the use of involuntary bankruptcy filings to accomplish indirectly what cannot be accomplished directly by creditors seeking to circumvent ERISA's spendthrift provisions. The Fourth Circuit's decision will also effectuate the policy of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), to provide favorable tax treatment for qualified pension plans by avoiding disruption through disqualification of an entire pension plan due to the bankruptcy filing of a single employee covered by the plan.

Inquiry need not be made under state spendthrift trust law to determine whether the pension plan is controlled by the settlor or the beneficiary or whether they are the same person. ERISA's anti-alienation provision prevents both voluntary and involuntary encroachment on vested benefits. Neither plan participants nor general creditors may reach the benefits under an ERISA qualified pension plan. Accordingly, no fact based state law inquiry associated with self-settled trusts is necessary. The enforceable restrictions placed on the transfer of pension interests by ERISA do not rest on the reality of the particular beneficiary-settlor-trust relationship but

rather on the status of the plan as ERISA qualified. Many practices encouraged by ERISA to encourage growth of pension funds conflict with state spendthrift trust law. The Bankruptcy Code and ERISA contain safeguards that adequately address the public policy concerns raised by Patterson. Accordingly, no public policy exception should be incorporated by the courts into ERISA.

In the event this Court were to determine that an ERISA qualified pension plan is property of the estate, then Shumate's interest in the pension plan is exempt from the bankruptcy estate under Bankruptcy Code §522(b)(2)(A). ERISA qualifies as an "other federal law exemption" available to debtors in bankruptcy to assist with their fresh start. The strong federal policy which has been developed by a body of federal common law operates effectively as a federal law exemption for ERISA qualified pension plans outside of bankruptcy cases. Neither case law nor legislation indicates any intent on the part of Congress to limit this recognized ERISA exemption to debtors outside of bankruptcy. Congress would not have enacted ERISA provisions it thought to be in conflict with the Bankruptcy Code or create significant qualification and administrative problems for qualified plans under the Bankruptcy Code and ERISA. ERISA's policy to protect pension plans from alienation and the Bankruptcy Code's fresh start policy mandate the extension of this exemption to bankruptcy cases.

ARGUMENT

I. A Debtor's Interest in an ERISA Qualified Pension Plan is Excluded from a Debtor's Bankruptcy Estate.

This case focuses on the right of a debtor-in-bankruptcy to retain the debtor's interest in a pension plan that contains an anti-alienation provision as required by the Employee Retirement Income Security Act of 1974. The analysis of this issue involves the interpretation and interplay of two federal laws: (1) the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 *et seq.*,[2] and (2) the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA").

Bankruptcy Code §541 creates a bankruptcy estate upon the filing of a bankruptcy petition which estate includes any legal or equitable interest the debtor may have in property. Bankruptcy Code §541(c)(2) excludes certain of a debtor's property interests from the broad definition of property of the debtor's bankruptcy estate. This section provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable *under applicable nonbankruptcy law is enforceable in a case under this title* [11 U.S.C. §101 *et seq.*].

11 U.S.C. §541(c)(2) (1986) (emphasis supplied).

ERISA creates a uniform system of federal law governing private pension plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (ERISA's crowning achievement is

[2] Further reference to Title 11, United States Code, will be designated as "Bankruptcy Code."

the reservation of federal authority to regulate the field of employee benefits). ERISA and its regulations provide uniform standards for creating, administering and funding pension plans. An integral part of this regulatory scheme is the inclusion of an anti-alienation provision that provides that benefits granted under the plan cannot be voluntarily or involuntarily assigned or alienated. *See* 29 U.S.C. §1056(d) (1988) and 26 U.S.C. §401(a)(13)(A) (1988).[3] The importance of this provision has been recognized by federal courts over ERISA's 20-year history.

The Court of Appeals for the Fourth Circuit held below that the term "applicable nonbankruptcy law" as used in Bankruptcy Code §541(c)(2) included ERISA. *See Shumate v. Patterson*, Pet. App. pp. 1a-11a. As ERISA imposes a restriction on the transfer of Shumate's beneficial interest in the ERISA qualified retirement plan, the plan benefits are excluded from the bankruptcy estate under Bankruptcy Code §541(c)(2). *Id.* Other Courts of Appeal have accepted this position. *See Velis v. Kardanis*,

[3] The Treasury regulations strongly support enforcement of the anti-alienation provision. *See* 26 C.F.R. §1.401(a-13)(b)(1) (1991). Congress gave authority to the Internal Revenue Service to define the anti-alienation provision of ERISA. H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 359-60 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5139. Generally courts are bound by legislative regulations issued pursuant to delegated power. Indeed such regulations can be set aside only if the administrative agency charged with administration of the statute exceeded its statutory authority or if the regulation is "arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law." *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (footnotes and citations omitted) (social security regulations).

949 F.2d 78 (3d Cir. 1991), *reh'g denied*, 949 F.2d 78 (3d Cir. 1991); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1991) *cert. denied* 111 S.Ct. 2275 (1991); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990); *see also*, concurring opinion in *John Hancock Mutual Life Ins. Co. v. Watson (In re Kincaid)*, 917 F.2d 1162 (9th Cir. 1990).

In contrast, Patterson argues that "applicable nonbankruptcy law" refers only to state spendthrift trust law.[4] In reaching this position, Patterson relies upon the authority of those cases in which other circuit courts invalidate the pension trusts of a debtor for public policy reasons when that debtor controls the settlor of the trust. *See Goff v. Taylor (In re Goff)*, 706 F.2d 574 (5th Cir. 1983); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1269 (8th Cir. 1984); *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352, *cert. denied*, 475 U.S. 1016 (9th Cir. 1985); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985). The policy followed in these cases ignores the anti-alienation provision embodied in ERISA qualified pension plans and applies state spendthrift trust law to determine whether the debtor's interest in a pension plan should be excluded from a bankruptcy estate.

[4] Bankruptcy Code §541(c)(2) makes no reference to "spendthrift trusts." This section merely refers to "trusts" generally. The statute addresses any trust that places a restriction on the transfer of a beneficial interest. ERISA mandates the creation of such a trust as part of its uniform requirements for establishing a qualified pension plan.

A. The Term "Applicable Nonbankruptcy Law" in 11 U.S.C. §541(c)(2) Is Not Limited to State Spendthrift Trust Law.

1. The Use of the Term "Applicable Nonbankruptcy Law" in the Bankruptcy Code is Not Ambiguous.

It is clear from the plain meaning of the phrase "applicable nonbankruptcy law" that it refers to whatever law may be applicable under the circumstances outside of bankruptcy. *See Toibb v. Radloff*, 111 S.Ct. 2197 (1991) (this Court adopted plain meaning of Bankruptcy Code in interpreting Bankruptcy Code §109). The phrase is intentionally broad so as to incorporate any law whether it be federal, state or local law – so long as the law in question is enforceable outside of bankruptcy. The broad reach of the term does not make it ambiguous. Nothing in the phrase suggests that it is intended to be restricted to any particular body of law. Clearly, if Congress had intended the phrase to apply to state law – or as Patterson argues, state spendthrift trust law – then Congress would have used that term. When Congress intended to refer to state law in other sections of the Code, it did so specifically.

Patterson argues that an ambiguity exists regarding the use of the term "applicable nonbankruptcy law" in Bankruptcy Code §541(c)(2). Because of this ambiguity, Patterson argues that the plain meaning of this term should not be used in defining the term and that legislative history should be consulted to interpret the term. This argument ignores the manner in which the terms "applicable nonbankruptcy law" and "state law" are used in other portions of the Bankruptcy Code.

Patterson agrees that statutes should be read as a whole and not in isolated parts. *Brief for the Petitioner*, p. 26 [citing *United States v. Morton*, 467 U.S. 822, 828 (1984)]. This Court has stated that statutory construction is a holistic endeavor. *See United Sav. Ass'n Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988). Although a provision may seem ambiguous in isolation, when that provision is read in the context of the statutory scheme in which it has been used repeatedly, then its meaning becomes clear. *Id.*

The term "applicable nonbankruptcy law" appears throughout the Bankruptcy Code and its related laws. In the following sections, this term was used by Congress to refer to federal law and also occasionally to refer to state law:

(1) in 11 U.S.C. §108(a)(b) & (c) the phrase "applicable nonbankruptcy law" refers to the extension of the statute of limitations by which an entity could pursue a federal or state law claim;

(2) in 11 U.S.C. §101(56)(F) the phrase "applicable nonbankruptcy law" is used to refer to federal copyright law;

(3) in 11 U.S.C. §365(n)(1)(B) the phrase "applicable nonbankruptcy law" is used to refer to the protection accorded intellectual property by federal law;

(4) in 11 U.S.C. §1125(d) the phrase "applicable nonbankruptcy law" is used to exempt post-petition disclosure and solicitation of statements from the requirements of federal or state securities laws;

(5) in 11 U.S.C. §1126(b)(1) the phrase "applicable nonbankruptcy law" is used to refer to the validity of acceptances of a plan that were received prior to the commencement of the case if there was compliance with federal or state securities laws;

(6) in 28 U.S.C. §1409(c)(d) & (e) the similar phrase "applicable nonbankruptcy venue" defines for venue purposes the proceedings arising under Title 11 or related to a case under Title 11 such as federal causes of action; and

(7) in 28 U.S.C. §1411 the phrase "applicable nonbankruptcy law" refers to the determination of the right of a jury trial in Title 11 cases for personal injury or wrongful death actions that arise under federal law such as the Federal Tort Claims Act.

The term "applicable nonbankruptcy law" should be given the same meaning in each part of the Bankruptcy Code in which it appears. In each of the above occurrences, the term "applicable nonbankruptcy law" refers to either federal law or both federal and state law. Accordingly, the use of this term in Bankruptcy Code §541(c)(2) should be interpreted to refer to both federal law and state law.[5]

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[5] Counsel for *amicus curiae*, David Tatge, Trustee, also argues that the meaning of the term "applicable nonbankruptcy law" in the Bankruptcy Code is ambiguous. He asserts that the use of this term in 11 U.S.C. §522(b)(2)(B), a section that excludes tenant by the entirety property from the bankruptcy estate, refers *only* to state law because he argues

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When Congress specifically wanted to refer to state law in the Bankruptcy Code it used the term "state law." The use of the term "state law" in the following sections of Title 11 reveals a congressional familiarity with the phrase:

(1) in 11 U.S.C. §109(c)(2) the term "state law" is used to refer to the authorization of certain entities to be a debtor under Chapter 9 of Title 11;

(2) in 11 U.S.C. §362(b)(12) the term "state law" is used in limiting the length of the automatic stay when foreclosing on ship/fleet mortgages;

(3) in 11 U.S.C. §522(b)(1) and (2) the term "state law that is applicable" is used in defining the types of exemptions available to a debtor;

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state law and not federal law defines property interests. Accordingly, he asserts that this reference creates an ambiguity in the meaning of the term "applicable nonbankruptcy law".

This argument ignores the existence of federal law such as District of Columbia law that does define a debtor's property interests. *See* D.C. Code Ann. §45-216 (1990 Repl. Vol.) (law defining tenant by the entirety property in the District of Columbia). The District of Columbia is an area that is under the ultimate legislative authority of the Congress; as such, its laws are a type of federal law. *See* U.S. Const., art I, §8, cl. 17; and D.C. Code Ann. §1-201 (1990 Repl. Vol.). The term "applicable nonbankruptcy law" was utilized in the broadest sense possible to encompass any law outside of bankruptcy dealing with tenants by the entirety property. It certainly was not intended to be restricted solely to state law.

(4) in 11 U.S.C. §903(1) the term "state law" is used to describe the interplay of state law with federal bankruptcy law in dealing with municipal bankruptcies;

(5) in 11 U.S.C. §523(a)(5) the term "in accordance with state or territorial laws" is used to define the non-dischargeability of state law support orders in bankruptcy cases; and

(6) in 11 U.S.C. §1145(a) the term "state or local laws" is used to refer to an exemption from state securities laws for certain sale offers.

These examples demonstrate that Congress knew how to refer to state law when it intended to limit a reference in the Bankruptcy Code to state law. The Bankruptcy Reform Act of 1978 was the result of careful drafting and study. *See* H.R. Rep. No. 595, 95th Cong. 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6325, and S. Rep. No. 989, 95th Cong. 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787. Each term that is used in the Bankruptcy Code should be given effect. The term "applicable nonbankruptcy law" as used in the context of the entire Bankruptcy Code does not refer exclusively to state law; accordingly, this Court should rule that the term "applicable nonbankruptcy law" refers to federal and state law.[6]

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[6] Even if the Court were to examine the legislative history of 11 U.S.C. §541(c)(2) regarding the term "applicable nonbankruptcy law," as Patterson suggests it should, this Court would discover that the legislative history is inconclusive. The Senate and House Reports only state that 11 U.S.C. §541(c)(2) excludes spendthrift trusts from the bankruptcy estate. The

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2. Interpreting the Term "Applicable Nonbankruptcy Law" to Include State and Federal Law Is Not Inconsistent With 11 U.S.C. §522(d)(10)(E) Nor Does Such an Interpretation Render That Section Superfluous.

Patterson argues that a broad reading of the term "applicable nonbankruptcy law" is inconsistent with 11 U.S.C. §522(d)(10)(E). Bankruptcy Code §522(d)(10)(E) defines the federal exemption for a debtor's future earnings.[7] Patterson argues that because the federal exemption includes a reference to an ERISA qualified pension

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legislative history does not mention the term state law. *See* H.R. Rep. No. 595, 95th Cong. 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5869; and S. Rep. No. 989, 95th Cong. 2d Sess. 83, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5869.

Additionally, the one time Congress amended the anti-alienation provision since adoption of ERISA it repeatedly referred to the anti-alienation section as "the spendthrift trust provisions of . . . ERISA." S. Rep. No. 575, 98th Cong. 1st Sess. 1, 3 and 18-19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2549 and 2564-65.

[7] The Bankruptcy Code provides for the existence of two alternative sets of exemptions. Bankruptcy Code Sections 522(b)(1) and 522(d) define the federal exemptions that exist under the Bankruptcy Code, and Bankruptcy Code Section 522(b)(2) permits a state to create its own exemptions for debtors which also encompasses federal exemptions other than those set forth in subsection (d). Bankruptcy Code Section 522(b) permits the debtor to select between the two alternative sets of exemptions unless the state has opted out. In the instant case, Shumate could only have chosen the state exemptions because Virginia has opted out of the federal exemptions. Va. Code §34-3.1 (1990).

plan and since an item must be property of the bankruptcy estate before it can be exempted from the estate, then by reading the term "applicable nonbankruptcy law" to include federal law, Bankruptcy Code §522(d)(10)(E) is made superfluous. Such a reading is not mandated by the Bankruptcy Code.

Bankruptcy Code §522(d)(10)(E) deals with all types of future earnings available to a debtor. It includes Social Security, unemployment compensation, veteran's benefits, disability benefits and pension benefits. Even as it applies to pension plans, this section is not specifically directed at ERISA qualified plans. Although, such plans are included in this section, the exemption is broad enough to include other types of pension plans besides ERISA qualified plans. For example, individual retirement accounts are covered by Bankruptcy Code §522(d)(10)(E). However, such accounts are not subject to the anti-alienation provision of ERISA and, accordingly, are not excluded from the bankruptcy estate by operation of Bankruptcy Code §541(c)(2). Therefore, the exemption afforded under Bankruptcy Code §522(d)(10)(E) would be necessary in order to exempt these types of retirement funds.[8]

Accordingly, reading the term "applicable nonbankruptcy law" to include ERISA qualified benefits will not make this entire section superfluous. The inclusion by

[8] The Court of Appeals for the Third Circuit has suggested that the exemption afforded under Bankruptcy Code §522(d)(10)(E) serves also to protect distributions of plan benefits which the debtor has a present and immediate right to receive. *See Velis v. Kardanis*, 949 F.2d 78, 81 (3d Cir. 1991).

Congress of ERISA qualified plans in this Bankruptcy Code Section serves only to insure that all types of future income for a debtor will be available for the debtor's fresh start. The existence of some overlap between Bankruptcy Code §§522(d)(10)(E) and 541(c)(2) is not significant and certainly does not require that ERISA qualified plans be included in the bankruptcy estate. If some reconciliation is needed between these two provisions, this is a legislative responsibility for Congress and not for the courts to assume.

3. A Broad Interpretation of the Term "Applicable Nonbankruptcy Law" in the Bankruptcy Code to Include State and Federal Law Harmonizes ERISA and the Bankruptcy Code.

A broad reading of the term "applicable nonbankruptcy law" allows ERISA to be construed consistently with the Bankruptcy Code. Whenever possible, a court should read statutes in harmony and not in conflict. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). Recently, this Court applied this principle of statutory construction to ERISA in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S. Ct. 680, 686-87 (1990), a case involving a union official who had been convicted of embezzling union funds. After the embezzlement was uncovered, the plan's administrators refused to pay any benefits to Guidry from the pension plan arguing that Guidry had forfeited his rights to such benefits because of his criminal activity. Guidry sued to recover his benefits. Although rejecting the forfeiture argument, the district court

imposed a constructive trust on the plan benefits. *Guidry,* 110 S. Ct. at 683-85.

On appeal, this Court examined and compared 29 U.S.C. §501(b) of the Labor-Management Reporting Disclosure Act of 1954 ("LMRDA") providing for the recovery of damages for a violation of the LMRDA with 29 U.S.C. §1056(d) (1988), the anti-alienation provision of ERISA. This Court first looked to the savings provision of ERISA, 29 U.S.C. §1144(d) (1988), which provides that nothing in ERISA shall alter, amend, modify, invalidate, impair or supersede any law of the United States. *Guidry,* 110 S. Ct. at 686-87. Instead of ruling that ERISA conflicted with the LMRDA, this Court harmonized the laws in order to give effect to the provisions of both federal laws. *Id.*

Here, an appropriate reading of the term "applicable nonbankruptcy law" will harmonize ERISA and the Bankruptcy Code. A main policy of ERISA is to protect the future pensions of individuals and to provide a stream of income for those individuals in their unemployable old age. *See* 29 U.S.C. §§1001(b) and (c) (1988); *see also, Guidry,* 110 S. Ct. at 687. An integral part of this protection is the required inclusion of an anti-alienation provision in ERISA qualified plans. *See* 29 U.S.C. §1056(d) (1988) and 26 U.S.C. §401(a)(13) (1988). Similarly, a major policy of the Bankruptcy Code is to provide an opportunity for the debtor to have a fresh start. *Perez v. Campbell,* 402 U.S. 637, 648 (1971); *Report of the Commission on the Bankruptcy Laws of the United States,* H.R. Doc. No. 137, 93rd. Cong., 1st Sess., pt. I, at 75 (1973); S. Rep. No. 989, 95th Cong., 2d Sess. 6, 12-13, *reprinted in* 1978 U.S. Code Cong. & Admin.

News 5787, 5792, 5798-99. By giving effect to the anti-alienation provision of ERISA and excluding an ERISA qualified pension plan under 11 U.S.C. §541(c)(2) the purpose of both laws will be advanced. The debtor will have a stream of future income with which the debtor can fund a post-petition fresh start.[9]

B. Public Policy as Enunciated in the Bankruptcy Code and ERISA Supports the Exclusion of a Debtor's Interest in an ERISA Qualified Pension Plan from the Debtor's Bankruptcy Estate.

The body of federal common law that has developed over the past 20 years interpreting ERISA establishes a strong federal policy to enforce the anti-alienation provision that is required in ERISA qualified pension plans. 29 U.S.C. §1001 (1988), *see also, Guidry,* 110 S. Ct. at 687,

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[9] The inability to protect an interest in a pension plan from the bankruptcy trustee would seriously threaten an elderly debtor's ability to obtain a fresh start. The interest that a debtor has in a qualified retirement plan is usually dependent upon the debtor's years of service or the years the debtor has worked and as to which contributions were made on the debtor's behalf. Older debtors will have less time to accumulate new or additional retirement benefits and accordingly will be the most exposed if their interests in a pension plan are not protected. Congress enacted the anti-alienation provision contained in ERISA to ensure that an employee's accrued benefits are actually available for retirement purposes. A fresh start to a debtor means protecting this interest. Accordingly, there is no conflict between the policies of the Bankruptcy Code and ERISA with regard to protection of employee benefit plans. *See* Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy,* 94 W.Va. Law Rev. 411, 462 (1991-92).

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980). This policy has been enunciated in a variety of federal cases. The Court of Appeals for the Fourth Circuit in *Smith v. Mirman* declared invalid an assignment of an ERISA qualified pension plan prior to a bankruptcy filing. The court observed, "[w]e see a danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers." *Smith v. Mirman (In re Mirman)*, 749 F.2d 181, 184 (4th Cir. 1984).

In *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688 (4th Cir. 1983) a bank sought to garnish a debtor's accrued interest in an ERISA qualified thrift and stock ownership plan. On appeal, the Court of Appeals for the Fourth Circuit ruled that the debtor's interest in the plan was exempt from a third party creditor's garnishment. That court reasoned, "[t]he funds here had been accumulated under a general plan for retirement, and the statutory scheme clearly contemplates that they should remain available for that purpose, even though the employee might obtain employment with another employer having a qualified plan, or quit, or otherwise become entitled to a lump sum distribution." *Tenneco, Inc.*, 698 F.2d at 690. *See also McLean v. Central States, Southeast and Southwest Areas Pension Fund (In re McLean)*, 762 F.2d 1204 (4th Cir. 1985) [Chapter 13 plan cannot be funded by direct payments from debtor's retirement plan to the trustee in that the retirement plan benefits were not property of the estate (spendthrift trust analysis)], *Retirement Fund Trust of Plumbing v. Franchise Tax Board*, 909 F.2d 1266, 1282-84 (9th Cir. 1990); *Herberger v. Shanbaum*,

897 F.2d 801 (5th Cir. 1990); *Traveler's Ins. Co. v. Fountain City Federal Credit Union*, 889 F.2d 264 (11th Cir. 1989); and *General Motors Corp. v. Buha*, 623 F.2d 445 (6th Cir. 1980). This body of federal common law recognizes the importance of ERISA's anti-alienation provision toward advancing the purposes of ERISA. As this Court stated in *Guidry*:

> Section 206(d) [29 U.S.C. §1056(d)] reflects a considered Congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.[10]

Guidry, 110 S.Ct. at 687.

The body of federal common law illustrated by these cases demonstrates that ERISA's anti-alienation provision is routinely enforced outside of the bankruptcy context. While Patterson recognizes this body of federal common law, he argues that it should not be applied in a bankruptcy case. *See Brief for the Petitioner*, at p. 19. If the court were to adopt such a position, then a debtor outside of a

[10] When Congress wanted to create an exception to the anti-alienation provision of ERISA, it did so. In 1984, Congress created an exception for qualified domestic relations orders. *See* 29 U.S.C. §1056(d)(3). *See also*, S. Rep. No. 575, 98th Cong. 1st Sess. 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2565. This subsection defines the sole, legislative exception to ERISA's anti-alienation provision.

bankruptcy case would be provided greater protection than a debtor in a bankruptcy case, an untenable position.

This Court has recognized (1) that there should be uniformity of treatment of property interests whether or not a debtor has filed a bankruptcy case and (2) that a creditor should not receive a windfall because of a bankruptcy filing. *See Butner v. U.S.*, 440 U.S. 48, 55 (1978). Failing to enforce ERISA's mandated anti-alienation provision would ignore this admonition. Not only would it create a disparity in treatment between a debtor who had filed bankruptcy and a debtor who had not, but also it would allow a creditor to receive a windfall from a pensioner's bankruptcy. Such treatment would encourage the filing of involuntary bankruptcies so that creditors could obtain a debtor's interest in a pension plan.

Also, such treatment would be contrary to ERISA's policy of enforcing the anti-alienation provision in order to protect a pensioner's interest in a pension plan. ERISA's pre-emption provision protects qualified plans from having to comply with vagaries of state spendthrift law before they are exempt from creditor attack. *See*, 29 U.S.C. §1144(a) (1988). In effect, Patterson's argument would force the qualified plan to comply with each individual state's spendthrift trust law to ensure the total viability of the anti-alienation provision. In some states, the funds in a spendthrift trust can be reached by certain types of creditors. In other states, spendthrift trusts have been eliminated altogether. *See e.g.*, N.C. Gen. Stat. §36A-11S (Supp. 1981). Requiring pension plans to comply with the spendthrift trust law of each state would result in inconsistent application of the Bankruptcy Code

and ERISA.[11] The uniformity Congress sought to achieve when it adopted ERISA would have been circumvented.

C. The Bankruptcy Code and ERISA Adequately Protect a Trustee from Debtors Who Exert Control Over a Pension Plan.

No credence should be given to the argument that an equitable "public policy" exception should be applied to void ERISA's anti-alienation provision when a trust beneficiary has sufficient control to terminate a retirement plan. This suggested "public policy" exception is derived from the spendthrift trust laws of some states that deem a person in control of the creator of a trust to be the settlor of the trust. The "public policy" exception treats these trusts as self-settled because of the potential mischief that could result from the control over the trust assets. Incorporation of such a "public policy" exception into ERISA

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[11] Allowing Patterson to obtain the pension benefits could destroy the entire Plan's tax qualification rendering the Plan and its benefits taxable to Plan participants and beneficiaries. Private Letter Ruling No. 8910035, CCH Letter Ruling Reports (1988). Although Private Letter Rulings cannot be cited as precedent, 26 U.S.C. §6110(j)(3), this letter ruling demonstrates the very real possibility for adverse consequences to other plan participants, and it further illustrates why ERISA's public policy to protect plan benefits should override any competing policy or concern. Disqualification of a plan for one member disqualifies the plan for all other participants as well. In this case, disqualification would have devastating consequences as the 400 other plan participants may have to retroactively recognize the funds immediately as gross income and the exempt status of the Plan would be lost.

would frustrate ERISA's policies and purposes and would effectively rewrite the statute.

The preemption provision of ERISA was designed to protect qualified retirement plans from having to comply with the spendthrift trust laws of a given participant's state of domicile before the benefits under the plan were protected from alienation including creditor process. Some large companies have employees in each of the 50 states. Many practices permitted under ERISA to encourage the growth of pension funds constitute violations of the spendthrift trust laws of some states. Such practices include: having the right to make withdrawals from the plan in the event of hardship or termination, having the right to borrow money from the plan, and having the right to make contributions to the plan. *See e.g.*, *Johnson v. Fenslage (In re Johnson)*, 724 F.2d 1138 (5th Cir. 1984) (applying Texas law) (plan deemed self-settled where debtor's interest includes his own contributions). Furthermore, these concerns are adequately addressed under the protection already available in the Bankruptcy Code and by ERISA.

For example, Bankruptcy Code §548, the fraudulent conveyance provision, allows a trustee to avoid a debtor's transfer of property that was made within one year of the filing of the bankruptcy petition and that was made with the intent to hinder, delay or defraud creditors. Thus, if a debtor exerts control over a corporation (as opposed to having the mere potential to do so) that is prejudicial to the interests of the debtor's creditors, then Bankruptcy Code Section 548 empowers the trustee-in-bankruptcy to avoid any transaction resulting in a depletion of the bankruptcy estate that stems from the control,

and to recapture the property for the benefit of creditors. This fraudulent conveyance provision sufficiently addresses the public policy concerns raised by Patterson. *See, In re LaFata*, 41 B.R. 842, 844 (Bankr. E.D. Mich. 1984) (dicta).[12]

In this case, however, no suggestion has been made that Shumate ever exercised any control over the corporation to transfer assets to the Plan in order to defraud, hinder, or delay creditors. In fact, the bulk of Shumate's interest in the Plan accrued prior to Shumate's becoming president of Coleman and prior to Shumate's obtaining control of Coleman. The Plan was established in 1963. Shumate served as president of Coleman from 1979 until 1982; accordingly, only during a three-year period out of a 30-year career did Shumate have the ability to control Coleman. There were no modifications or amendments to the Plan during Shumate's tenure as president of Coleman. The Court of Appeals for the Fourth Circuit specifically recognized that Shumate only had potential control over Coleman, the settlor of the Plan. *See Shumate v. Patterson*, Pet. App. 1a, 7a, n.3. Any control that Shumate might have been able to exercise over the Plan would have had no impact over his Plan interest.[13]

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[12] Bankruptcy Code Section 547, the preference provision, also could be used to avoid improper transfers to a pension plan. *See Sterling Die Casting Co., Inc. v. Local 365 UAW Welfare and Pension Fund (In re Sterling Die Casting Co., Inc.)*, 118 B.R. 205 (Bankr. E.D.N.Y. 1990). Again the record does not disclose any basis for this type of action.

[13] Even if one accepts the application of the public policy exception applicable to state spendthrift trusts, any control

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Patterson is not the proper party to raise these concerns. If such a transfer had occurred, then it would have been Creasy, the trustee-in-bankruptcy for Coleman, who would have been the proper party to raise these issues. Given these facts there is no reason to apply Patterson's asserted public policy exception to bring Shumate's pension into the bankruptcy estate because there has been no harm to Shumate's creditors.

Additionally, ERISA offers protection against such mischievous conduct. ERISA and the legislative regulations[14] that interpret it contain (1) limits on the amount of funds that can be sheltered under a plan by an individual, 26 U.S.C. §415(c) and (d) (1988 & Supp. I 1989); (2) limits on the ability of an entity to develop a short-term plan, 26 C.F.R. §1.401-1(b)(2) (1991); and (3) qualifications on the type and number of employees that must be

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that Shumate exercised over Coleman does not warrant the application of the policy. It has been established that "limited control [over a pension plan] may be permitted if its exercise would create such a hardship for the debtor as to discourage its exercise except in dire circumstances." *In re Pettit*, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986). The control that Shumate *possibly* could have exercised is similar to the hardship control that courts have allowed beneficiaries to exercise without destroying the non-alienation aspect of pension benefits. *See Gennet v. ICMA Retirement Corp. (In re Forbes)*, 65 B.R. 58 (Bankr. S.D. Fla. 1986) (ability to obtain benefits if beneficiary terminates employment is not sufficient control to defeat "spendthrift nature" of pension). Further, such inclusion suggests that Shumate had unfettered control over the Coleman Plan which is simply inconsistent with ERISA's fiduciary provisions. *See* ERISA §§401-414.

[14] See n. 3, *supra* at 10 regarding legislative regulations.

covered to enjoy benefits of an ERISA-qualified plan, 26 U.S.C. §410(b) (1988). Given these existing federal protections, it is unnecessary for this Court to impose state spendthrift law protection on the Bankruptcy Code or on ERISA. Again, if such an exception is to be made, Congress, not the courts, should legislate the change. *Guidry*, 110 S.Ct. at 686-87.

D. Shumate's Interest in the Coleman Retirement Plan is Excluded from his Bankruptcy Estate.

The plain meaning of Bankruptcy Code §541(c)(2) excludes Shumate's interest in the pension trust from the bankruptcy estate because the Plan contains the anti-alienation provision required by ERISA. The anti-alienation provision imposes a restriction on the transfer of Shumate's beneficial interest in the Plan which is enforceable under applicable nonbankruptcy law. The use of the term "applicable nonbankruptcy law" in the Bankruptcy Code does not preclude the application of ERISA. Rather, the policies of the Bankruptcy Code and ERISA support a determination that ERISA qualified pension plans should be excluded from a debtor's bankruptcy estate. Accordingly, this Court should affirm the holding by the Fourth Circuit that Shumate's interest in the Plan is excluded from his bankruptcy estate.

II. The Debtor's Interest in the ERISA Qualified Pension Plan Would in Any Event Qualify for Exemption Under 11 U.S.C. §522(b)(2)(A) of the Bankruptcy Code.

Even though the Court of Appeals did not decide the issue whether an ERISA qualified pension plan was

exempt from the bankruptcy estate, Patterson seeks to have this Court determine this issue in the event it concurs with Patterson that applicable non-bankruptcy law under Bankruptcy Code §541(c)(2) does not include ERISA. The Court of Appeals did not reach this issue because its conclusion that the Plan was not property of the bankruptcy estate made it unnecessary for it to do so. The Court of Appeals did note, however, that it found the court's opinion in *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989), to be persuasive. Pet. App., p. 11a. *Komet* held that a debtor's interest in an ERISA qualified pension plan should be subject to exemption under Bankruptcy Code §522(b)(2)(A) because ERISA is "federal law."[15]

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[15] The court in *Komet* noted that the principle impediment to such a holding was the "strong dicta" in *In re Goff*, 706 F.2d 574 (5th Cir. 1983), that had been followed by a majority of jurisdictions. The court examined the weakness of *Goff* and concluded its analysis was flawed for four reasons: (i) *Goff* mistakenly characterizes the function of the anti-alienation language as applying to tax treatment only; (ii) *Goff* misinterprets the structure and purpose of the Bankruptcy Code and finds "a Congressional policy" antithetical to the retention of retirement benefits where precisely the opposite policy is indicated; (iii) *Goff* misinterprets the legislative history of the Bankruptcy Code §522(a); and (iv) *Goff* mistakenly presumed that the Bankruptcy Code implicitly repealed ERISA anti-alienation provision. *In re Komet*, B.R. 104 at 809-16.

A. Bankruptcy Code §522(b)(2)(A) Permits Debtors to Avail Themselves of Federal Exemptions Such as that Created by ERISA.

1. The Anti-Alienation Provision in ERISA Constitutes a Federal Exemption Recognized Under the Bankruptcy Code.

Section 522 of the Bankruptcy Code allows debtors to retain certain of their property by exemption. This section serves to advance one of the most important purposes of bankruptcy policy: to provide a fresh start for debtors. *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. I, at 75 (1973); S. Rep. No. 989, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5792.

Bankruptcy Code §522(b)(2)(A) provides:

> Notwithstanding §541 of this Title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or in the alternative, paragraph (2) of this subsection. . . . Such property is –
>
> (1) property that is specified under subsection (d) of this section . . . [16]

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[16] Congress added in subsection (d) a list of generic federal exemptions as an alternative exemption scheme. *See* n. 7, *infra* at 17. It gave the debtor a choice between the generic federal exemptions listed in subsection (d) of Bankruptcy Code §522 or the exemptions to which the debtor was entitled otherwise under "other federal law" and the law of the state of the debtor's domicile. 11 U.S.C. §522(b) (1988); H.R. Rep. No. 595,

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> (2) Any property that is *exempt under federal law other than subsection (d) of this section*, or state or local law that is applicable on the date of the filing of the petition . . . .

11 U.S.C. §522(b)(2)(A) (1988 & Supp. II 1990) (emphasis added).

The provision of ERISA that mandates anti-alienation, 29 U.S.C. §1056(d)(1) (1988), constitutes an exemption under "federal law" which in turn can be exempted by a debtor from property of the estate under Bankruptcy Code §522(b)(2)(A). *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989); *Barr v. Hinshaw (In re Hinshaw)*, 23 B.R. 233 (Bankr. D. Kan. 1982); *In re Messing*, 114 B.R. 541 (Bankr. E.D. Tenn. 1990); *In re Starkey*, 116 B.R. 259 (Bankr. D. Colo. 1990); *In re Suaxez*, 127 B.R. 73 (Bankr. S.D. Fla. 1991); *In re White*, 131 B.R. 526 (Bankr. D. Mass. 1991). As this Court has previously observed, Congress adopted 29 U.S.C. §1056(d) because otherwise "ERISA plan benefits could be attached or garnished." *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) (dicta).

ERISA contains a preemption provision, 11 U.S.C. §1144(a), that was intended by Congress to create uniformity in employee benefit law without the necessity of reference to varying state laws. Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W.Va. L.R. 411, 439

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95th Cong., 1st Sess. 360-363, *reprinted in* U.S. Code Cong. & Admin. News 5963, 6315-19. Most states have eliminated this choice by "opting out" of the federal exemption scheme. 3 L. King, *Collier on Bankruptcy* ¶522.02 (15th ed. 1991).

(1992). The provision in ERISA that compels private employee pension plans to incorporate an anti-alienation provision, 29 U.S.C. §1056(d), has been held by most courts to override the operation of state law collection statutes on account of the preemption provision. A body of federal common law has developed around ERISA's anti-alienation provision holding that it insulates retirement benefits in a qualified plan from liability under state law levy or attachment. *Traveler's Ins. Companies v. Fountain City Fed. Credit Union*, 889 F.2d 264, 266 (11th Cir. 1989); *General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980); *Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank*, 526 F. Supp. 510, 513 (N.D. Tex. 1981); *Retirement Fund Trust of Plumbing v. Franchise Tax Board*, 909 F.2d 1266, 1283-86 (9th Cir. 1990); *Northwest Airlines, Inc. v. Roemer*, 603 F.Supp. 7, 9-11 (D. Minn. 1984); *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688, 690-91 (4th Cir. 1983); and *Smith v. Mirman (In re Mirman)*, 749 F.2d 181, 183-84 (4th Cir. 1984). The anti-alienation provision of ERISA as developed by this body of federal common law functions effectively as an exemption created by federal law because it shelters the debtor's interest in this property from creditor process. Accordingly, to the extent not excluded from the bankruptcy estate, ERISA creates a federal exemption that is applicable in bankruptcy under the "other federal law" rubric of Bankruptcy Code §522(b)(2)(A). *In re Komet*, 104 B.R. at 805-06.

2. Congress Expressed no Intent to Restrict The ERISA Exemption That is Available Outside of a Bankruptcy Case to a Debtor in Bankruptcy.

The federal exemption for ERISA qualified pension plans should be extended to debtors in bankruptcy cases. Congress never indicated any intention to eliminate the protection afforded to ERISA qualified plan benefits under the body of federal common law to pensioners who file bankruptcy. As the bankruptcy court stated in *Komet*, "had Congress intended to exclude ERISA regulated plans from the 'other federal law' rubric, it would certainly have done so in the Bankruptcy Code itself." *In re Komet*, 104 B.R. at 814. If the rule were otherwise, creditors would be able to reach a pensioner's interest in a retirement plan simply by forcing the pensioner into bankruptcy. The law has long discouraged differences between the substantive law of bankruptcy and debtor creditor law generally. *Butner v. United States*, 440 U.S. 48, 55 (1978) ("Uniform treatment of property . . . serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from 'receiving a windfall merely by reason of the happenstance of bankruptcy'"). Absent a clear directive from Congress to the contrary, the exemption for ERISA plan benefits should be the same both inside and outside of bankruptcy.

3. Adoption of Bankruptcy Code §522(b)(2)(A) Did Not Change Prior Law.

When Congress enacted Bankruptcy Code §522 as part of the new Bankruptcy Code, it intended to continue

the exemption scheme that had existed previously under the Bankruptcy Act of 1898. Congress did not intend to change the nature and extent of existing exemptions. *See In re Komet*, 104 B.R. at 811 [citing *Report of the Commission on Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess. pt. I, at 16 (1973)]. Rather, those kinds of issues were left to be controlled by the statute which confers the exemption and the case law which construes it. 1A J. Moore and L. King, *Collier on Bankruptcy*, ¶6.17 (14th ed. 1974). The exemption scheme under Bankruptcy Code §522 basically honored whatever exemptions the debtor was entitled to receive outside of bankruptcy whether those exemptions were state or federal in origin.[17] Accordingly, there was no intent on the part of Congress to change, repeal or delete any exemption available to debtors under ERISA at the time it adopted the new Bankruptcy Code in 1979.[18]

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[17] Section 6 of the Bankruptcy Act of 1898 allowed debtors to avail themselves of exemptions which were prescribed by the laws of the United States or by the state law in force at the time of the filing of the petition in the state wherein the bankrupts were domiciled. This section of the Bankruptcy Act of 1898 was reenacted in the Bankruptcy Code as §522(b)(2)(A) substantially without change. H.R. Rep. No. 595, 95th Cong., 1st Sess. 126, 360, *reprinted in* 1978 U.S. Cong. & Admin. News 5963, 6316-19.

[18] It has been suggested by a number of courts that the savings provision in ERISA effectively subordinates ERISA's provisions to those contained in the Bankruptcy Code. *See In re Komet*, 104 B.R. at 815; *McLean*, 762 F.2d 1204 (4th Cir. 1985). This Court has refused on previous occasions to interpret the savings provision so broadly. *See Guidry*, 110 S.Ct. 680. With

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B. Patterson's Arguments That There is no ERISA Bankruptcy Exemption Under Bankruptcy Code §522(b)(2)(A) Are Without Merit.

Patterson advances two reasons why ERISA does not constitute an exemption under federal law. First, Patterson argues that such an exemption would render Bankruptcy Code §522(d)(10)(E) meaningless. Second, Patterson argues that this treatment would be contrary to the legislative history of Bankruptcy Code §522. Neither of these arguments is well founded.

1. There is no Conflict Between Bankruptcy Code §§522(b)(2)(A) and 522(d)(10)(E).

There is no internal conflict within the provisions of Bankruptcy Code §522. The scheme Congress adopted for exemptions under Bankruptcy Code §522 gives debtors a choice between the exemptions available under subsection (d) of Bankruptcy Code §522 and the exemptions otherwise available under federal law or under the law of the state in which the debtor was domiciled. By opting out of the federal exemption scheme, Virginia eliminated this choice for its citizens. Accordingly, Shumate was not entitled to elect the exemptions listed under subsection (d) of Bankruptcy Code §522.

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regard to the exemption scheme, Congress did not intend to change the prior law. Accordingly, the Court should not interpret the savings provisions of ERISA to effect an implied repeal of the ERISA spendthrift trust provisions. *Id.*

But Patterson's assertion to the contrary notwithstanding, even if Shumate was a resident of a non-opt-out state, he would not have been restricted to the exemptions under Bankruptcy Code §522(d). Rather, he would have been able to elect to proceed under those exemptions or under the exemptions otherwise available under federal law and the exemptions available under the laws of the Commonwealth of Virginia. The list of exemptions that would otherwise be available under subsection (d) of Bankruptcy Code §522 represents an alternative exemption scheme. It includes provisions for homesteads, cars, clothing and other enumerated categories of property in addition to retirement benefits.[19] If a debtor chooses to proceed under Bankruptcy Code §522(d), then as a consequence that debtor must forego the existing exemptions under the debtor's state of domicile as well as any exemption that might otherwise be available under federal law.[20] The exemption for retirement benefits under

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[19] Indeed there are many categories of exempt property such as Social Security benefits that are totally exempt under both of the alternative exemption schemes. There are other categories of exempt property that are exempt under only one or the other of the exemption schemes depending upon the debtor's choice.

[20] For example, a married debtor may be able to exempt real estate owned by the debtor and his wife as tenants by the entirety under Bankruptcy Code §522(b)(2)(B). If the debtor were to elect to proceed under Bankruptcy Code §522(d), however, he would not be able to avail himself of the tenants by the entirety exemption. Instead, the debtor would be able to retain only $7,500.00 of the value in real estate that the debtor uses as his residence. 11 U.S.C. §522(d)(1) (1988). The fact that the debtor could elect to proceed under the generic scheme set

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subsection (d) of Bankruptcy Code §522 places a limitation on the exemption which is not otherwise found in ERISA. It limits the exemption to benefits that are reasonably necessary for the support of the debtor and dependents of the debtor. This limitation may be chosen by a debtor in a non-opt-out state because of the enhancements offered under other of the alternative exemptions.

This alternative exemption scheme should not affect the interpretation of the otherwise existing exemptions which have a source independent of the exemptions set forth in subsection (d) of Bankruptcy Code §522. *In re Komet*, 104 B.R. at 812-13. Accordingly, treating ERISA as the federal law exemption it clearly is can be easily reconciled with the limitation placed on retirement benefits for a debtor who chooses to proceed under the alternative exemption scheme of Bankruptcy Code §522(d).

2. The Legislative History is Inconclusive.

The second reason advanced by Patterson why ERISA does not create an exemption under federal law is that the House and Senate Reports that list examples of federal exemptions in the legislative history of Bankruptcy Code §522(b) omitted any reference to ERISA. Patterson cites the strong *dicta* in *Goff* in support of this

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forth in Bankruptcy Code §522(d) and not avail himself of the exemption relating to property as tenants by the entirety should not affect the manner in which the bankruptcy courts construe the exemption for tenants by the entirety property.

argument. *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 585 (1983). There are three responses to this argument.

First, courts should not refer to the legislative history of a statute for interpretation of it unless the statute itself is ambiguous and needs interpretation. *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 451 (1987) (an unambiguous statute must be regarded as conclusive absent any clearly expressed legislative interpretation to the contrary). There is no ambiguity contained in the plain meaning of Bankruptcy Code §522(b)(2)(A). The suggested ambiguity is contrived by Patterson's first argument. Furthermore, there is nothing in the Bankruptcy Code itself that purports to limit a debtor's access to federal exemptions that are created outside of bankruptcy.

Second, the legislative history list was never intended to be exclusive. H.R. Rep. No. 595, 95th Cong. 1st Sess., n. 157 at 360, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6316 ("if the debtor chooses Bankruptcy Code [§522(b)], *some* of the items that *may* be exempted under federal laws *include* . . . . ") (emphasis supplied). No inference should be drawn from an omission made to an illustrative list.[21] *Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S.Ct. 2668, 2677 (1990) (statutory

[21] It has been suggested that the reason the legislative list omitted ERISA was not an oversight on Congress' part at all. Rather, since ERISA pension plans are excluded from a bankruptcy estate by the trust exclusion in Bankruptcy Code §541(c), Congress may have felt it was unnecessary to list an exemption for them in the legislative history of Bankruptcy Code §522. Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W.Va. Law Rev. 411, 453, n.182 (1991-92).

language not modified by examples set forth in legislative history).

Finally, the legislative history list contains mistakes. For example, the list refers to Civil Service Retirement and to Foreign Service Retirement and Disability Payments both of which had been changed prior to adoption of the Bankruptcy Code. *See In re Burns*, 108 B.R. 308, 315, n.7 (Bankr. W.D. Ok. 1989). Accordingly, the legislative history should not be read as anything more than an "illustrative list" which merely indicates what might qualify for exemption under Bankruptcy Code §522(b)(2)(A).

C. The Strained Interpretation Advanced by *Goff* and Its Progeny Frustrate the Policies That the Bankruptcy Code and ERISA Were Intended to Advance.

The same courts that hold that ERISA must comply with state spendthrift trust law for qualified retirement benefits to be excluded from a bankruptcy estate, also conclude that ERISA preempts any state law provision that would provide an exemption for these same retirement plan benefits. *See, e.g., Reed v. Drummond (In re Reed)*, 951 F.2d 1046 (9th Cir. 1991). These cases, after concluding there is no federal exemption under ERISA available to exempt plan benefits, hold that because a state's exemption law dealing with retirement benefits "relates to ERISA," the exemption is preempted by ERISA. *Id.* at 1048, *citing Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___, 111 S.Ct. 478, 484 (1990). This holding makes Bankruptcy Code §522(d)(10)(E) the exclusive means by

which a debtor can exempt qualified retirement plan benefits.

The Hobson's choice that results from these rulings means that plan beneficiaries in states that have "opted-out" of the alternative exemption scheme have no way to protect any portion of their retirement benefit. This result represents a significant departure from the law as it existed prior to adoption of the new Bankruptcy Code and it also serves to frustrate the pension protections of ERISA and the fresh start policy of the Bankruptcy Code.

CONCLUSION

The ruling of the Court of Appeals for the Fourth Circuit in this case should be affirmed. This Court should find that the term applicable nonbankruptcy law, as used in 11 U.S.C. §541(c)(2) (1988), refers to federal laws such as ERISA as well as state law and that a debtor's interest in an ERISA qualified pension plan does not become a part of a debtor's bankruptcy estate. In the alternative, if this Court determines that an ERISA qualified pension plan is property of the bankruptcy estate, then this Court should find that the term other federal law, as used in 11 U.S.C. §522(b)(2)(A) (1988 & Supp. II 1990), includes

ERISA and that a debtor's interest in an ERISA qualified pension is exempt from the debtor's bankruptcy estate.

Respectfully submitted,

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No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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STATEMENT OF THE CASE

Shumate's statement of the case (Br. p. 1) presents some incomplete representations of fact not supported by the record. There is no evidence in the record which in any way establishes the CFC Plan benefits are necessary for Shumate's livelihood. There is likewise no evidence establishing Shumate's employment status at any point since he filed for bankruptcy. While Shumate did proceed in forma pauperis in this case, it was done with the Trustee's acquiescence to facilitate the disposition of this matter without endless litigation over his in forma pauperis status.

REPLY ARGUMENT

I. The plain meaning of Bankruptcy Code § 522(d)(10)(E)(iii) is rendered superfluous if

"applicable nonbankruptcy law" under § 541(c)(2) creates an exclusion of ERISA pension benefits from the bankruptcy estate.

The Trustee, as well as *amicus*, Tatge, stand on the proposition that the plain language of § 522(d)(10)(E)(iii) establishes that a debtor's rights in a private employer's ERISA qualified § 401(a) pension plan, such as the CFC Plan, of necessity must be included in the bankruptcy estate under § 541. Otherwise, § 522(d)(10)(E)(iii) will be deprived of its substantive meaning.

If the plain meaning of § 522 is to be followed to give effect to the specific reference by Congress in § 522(d) to exempt pension, stock bonus and profit sharing ERISA benefits, it logically follows those same benefits could not be excluded from

the bankruptcy estate under § 541(c)(2).

It seems evident from the statutory language of § 522(d)(10)(E)(iii) that the Trustee is correct on this point unless one of two circumstances exists:

1. §522(d)(10)(E) (iii) is limited to the small minority of IRC § 401(a) plans covering churches and government plans (which are not required by ERISA to have an antialienation clause); or,

2. § 522(d)(10)(E)(iii) is limited in application only to current distributions from ERISA plans.

The Bankruptcy Code's legislative history (Tr. Br. p. 21, 25) establishes that all the debtor's property comes into the estate with exemptions then taking effect under §522. The Report of the Commission on the Bankruptcy Laws of the United States, (Tr. Br. p. 28), discusses the precursor of §522(d)(10)(E), §4-503.

Note 8 to § 4-503 establishes that the drafters of the Bankruptcy Code intended rights under tax qualified pension plans of private companies to come into the estate, and thereafter be exempted subject to a reasonable support limitation (Tatge Br. p. 10), (U.S. Br. p. 22).

Amicus, the United States, argues (Br. 17, 18) there were a small number a pre-Code cases treating federal trust property as excluded from the bankruptcy estate. The Government's argument ignores the statutory language of §522(d)(10)(E)(iii) of present law, which requires, on its face, that a debtor's pension rights under a plan which is tax qualified under §401(a) first comes into the estate. Second, the United States ignores the fact there is a much broader scope of "property of the estate" under the Bankruptcy Code, as opposed to under prior law. Indeed, the

legislative history of §541(c)(2) states that it "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent that the trust is protected from creditor's under applicable State law" (emphasis added). H.R. Rep. No. 595, 95th Cong. 1st Ses. 369, 176 (1977). The drafters of the Bankruptcy Code may well have intended thereby to signal that restrictions on transfer under "federal law" itself were no longer a reason to exclude property from the estate (if indeed they ever were), consistent with the drafter's intent to exempt under §522(d)(10)(E) a debtor's rights under a private employer's pension trust qualified under §401(a), at least where "federal" exemptions were chosen. Finally, expanding the scope of § 4-601 in § 541(c)(2) as enacted to wholly exclude a debtor's rights

under a state law spendthrift trust, such as a testamentary trust, in no way establishes that § 401(a) pension trusts, exempted under § 522(d)(10)(E), are covered by § 541(c)(2). The Government's analysis is merely a restatement of its own position, contrary to the statutory language of § 522(d)(10)(E)(iii).

The other circumstance by which the Trustee's argument might fail rests on the position of the Third Circuit in Vellis v. Kardanis, 949 F. 2d, 78, 80 (3rd Cir. 1991), which holds that § 522(d)(10)(E) is harmonized with § 541(c)(2) by treating the exemptions under § 522 as applying only to an immediate and present right to receive benefits. Even amicus, the United States, (Br. p. 23 N. 16) does not agree with this position. Moreover, none of the cases cited by the Trustee or Tatge are distinguished.

The argument that § 522(d)(10)(E) will allow the Trustee to reach distributions during the pendency of the bankruptcy effectively represents a complete exclusion as few cases, particularly with controlled plans, would have distributions.

The straight forward reading required by the cannons of statutory construction, which both Shumate and _amicus_, the United States seek, requires, if anything, that § 522(d)(10)(E) be given its "plain meaning" with respect to § 401(a) pension, stock bonus and profit sharing plans, rather than any "plain meaning" to be ascribed to "applicable nonbankruptcy law" in § 541(c)(2), which is ambiguous and subject to varying interpretations (Tr. Br. p. 33-39).

II. _This Court's decision in Guidry does not bar the application of 29 U.S.C. § 1144(d), the ERISA savings clause, in bankruptcy matters._

Shumate (Br. 19,20) and _amicus_, the United States (Br. P. 12,13), cite this Court's decision in _Guidry v. Sheet Metal Workers Pension Fund_, 110 S.Ct. 680 (1990) as establishing an over-riding policy to exclude ERISA pension benefits from the bankruptcy estate despite contradictions in the Bankruptcy Code. These arguments do not adequately address the impact of ERISA's savings statute, 29 U.S.C. § 1144(d), where there is a conflict between ERISA and the Bankruptcy Code.

The creditor in _Guidry_ argued 29 U.S.C. § 1144(d) applied to thwart the antialienation protection of 29 U.S.C. § 1056(d)(1) by virtue of a broad grant of a cause of action under the Labor Management Relations Act (LMRA). This Court rejected that argument for reasons significantly

different from the case at bar.

First, the LMRA has its own savings clause, 29 U.S.C. § 523(a). This Court viewed the existence of that statute to effectively trump the use of the ERISA savings clause to give any portion of the LMRA priority over ERISA. 110 S. Ct. 680, 687 (Note 17). No such savings clause, parallel to that of the LMRA, applies to the Bankruptcy Code.

Secondly, the LMRA's purported conflict with ERISA was through the broad grant of a cause of action which made no reference to ERISA (Tr. Br. p. 45). This is far different from the specific Bankruptcy Code provisions at issue here. Section 541 creates an all inclusive estate, even of property which may subsequently be exempt. (Tr. Br. p. 27). Unlike the LMRA, Bankruptcy Code § 522 specifically refers to qualified §401(a)

plans subject to ERISA.

There is no question that Guidry controls the application of ERISA in a nonbankruptcy setting. However, ERISA's savings clause does not act as a bar to bankruptcy treatment of ERISA benefits in a manner different from that of nonbankruptcy treatment. On the contrary, ERISA's savings clause was included by Congress to insure that another federal statute in conflict was not subjugated to the ERISA directive. Had Congress desired an exception to the ERISA savings clause in 29 U.S.C. § 1144(d) for bankruptcy purposes, it would have included such either in Title 29 or Title 11 of the United States Code (as in the LMRA) but has not done so.

III. The spectre of involuntary bankruptcy filings or tax disqualification of ERISA plans

is speculative and unsupported.

Shumate (Br. P. 24, 25) and amicus, the United States (Br. p. 11, 26), argue a flood of involuntary bankruptcies and tax disqualifications of ERISA plans would ensue if the Trustee's position is adopted. These arguments are not supported upon close examination and run contrary to the expressed congressional intent for treatment of ERISA benefits in bankruptcy.

No party cites any case where a debtor was placed in involuntary bankruptcy in order to get at his ERISA plan benefit. Despite the long standing run of this type litigation, as well as the multitude of such cases, it seems difficult to see this prospect as a cogent threat since none has occurred.

Similarly, the argument of a federal income tax armageddon is not supported by any reported case on point. Both Shumate

(Br. 25) and amicus, the United States (Br. p. 11), offer the opinion of the Internal Revenue Service, through a few private letter rulings, that tax disqualification of an ERISA plan might occur in the event the plan trustee obeyed a valid federal court order to turn over assets of a pension plan to a bankruptcy trustee. This argument is difficult to justify since the Government represents it has the discretion not to pursue disqualification in any event (U.S. Br. p. 11. N.5).

Once again, no party cites any case where such an action has occurred or even been proposed by the Internal Revenue Service despite the long history and number of such cases. This could be, in part, because the Internal Revenue Code specifically prohibits using such private letter rulings as any authority. 26 U.S.C. § 6110(j)(3). By contrast, as noted by

amicus, Tatge (Br. p. 27), there are a number of cases where the debtor has raised the possibility of disqualification, but not the Internal Revenue Service. The Courts studying that question have found no disqualification of the plan.

These policy arguments are overblown, in any event, when taken in the context of the extremely limited number of cases (and for that matter pension plans) to which a ruling for the Trustee in this case would apply.

Only a minute minority of plan participants who become debtors in bankruptcy would possess the requisite dominion and control over the pension plan which would bring the plan benefit into the estate. This circle is even more tightly drawn under the facts of this case as it deals with plan benefits from a terminating plan in pay status. Both of these are

significantly limiting factors that significantly ameliorate any of the policy concerns raised by Shumate and the various amici.

As discussed below, the invasive impact on a continuing pension plan, where the debtor is not presently entitled to the plan benefit, is de minimus. The Trustee could not accede to a benefit not available to the debtor. In Re Schauer, 835 F.2d 1222 (8th Cir. 1987).

IV. Under the Midlantic National Bank rule, the pre-Code practice which includes distributable benefits from a terminated plan as part of the bankruptcy estate is carried over under the Code.

The Trustee (Br. p. 39-42) discussed the rule of bankruptcy interpretation established by Midlantic National Bank v.

New Jersey, 474 U.S. 494 (1986) and recently affirmed by this Court in Dewsnup v. Timm, No. 90-741, 60 U.S.L.W. 4111, 4113 (decided January 15, 1992).

> This Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in a legislative history.

No party contests the broad point that the Bankruptcy Code continues over the exclusion of spendthrift (U.S. Br. p. 17) trusts from the estate and that practice is continued under the Midlantic rule. As Dewsnup indicates, pre-Code practice, unless specifically changed by the Bankruptcy Code, or its legislative history, continues to be the law.

Amicus, Wal-Mart Stores, Inc., (Br. p. 20-24) and amicus ERISA Industry Committee

(Br. p. 21), discuss that it was pre-Code practice to include in the bankruptcy estate pension benefits in pay status from a terminated plan, which is the case with Shumate's benefit in the CFC plan.

Amicus, the United States, (Br. 17) implies a pre-Code practice of exclusion from the estate for certain trust assets, but not as to benefits from a terminated plan ready for payment. In fact, the cases cited by the government, support the Trustee's position. Danning v. Lederer, 232 F.2d 610, 614 (7th Cir. 1956), found the bankruptcy trustee was not prevented from obtaining the debtor's beneficial interest in a trust unless state law governing the trust stopped him. Similarly, Jones v. Harrison, 7 F.2d 461 (8th Cir. 1925) was based on what state law rights the bankruptcy trustee acquired and those determined what was in the estate.

Neither case dealt with pre-ERISA protection and neither trust was terminated with the beneficiaries awaiting distribution.

Amicus, ERISA Industry Committee (Br. p. 21), and amicus, Wal-Mart Stores, Inc., (Br. p. 20) concede that an ERISA benefit distributable to the participant at the time of bankruptcy from a terminated plan was included in the Bankruptcy estate under pre-Code law. Indeed, the ERISA Industry Committee admits they can find no opinion which excluded such a presently distributable interest from the bankrupt's estate under Section 70 of the Bankruptcy Act. No other party cites a contrary case.

While there are cases excluding benefits in a federal plan, Tennessee Valley Authority vs. Kincer, 142 F. 2d 833 (6th Cir. 1944), or a continuing plan to which the debtor had no access, Turpin v.

Wente, 644 F.2d 472 (5th Cir. 1981) there appears to be clear pre-Code bankruptcy law including ERISA covered benefits in pay status in the bankruptcy estate. Dunlavey vs. Newman, 2 Br. 500 (Bankr. D. Ariz. 1980). Short v. Grand, 507 F. 2d 425 (8th Cir. 1974). Judson v. Witlin, 640 F. 2d 661 (5th Cir. 1981). These cases follow the bankruptcy maxum that the Bankruptcy Trustee acquires no greater rights than the debtor enjoyed. It is to this right of Shumate that the Trustee argues he has succeeded (Tr. Br. p. 32).

Newman, Grand and Witlin, following the direction of this Court's decision in Kokoszka v. Belford, 417 U.S. 642 (1974) held, despite antialienation provisions, that the plan interest of each debtor was an included bankruptcy estate asset. Each debtor had a present right to receive the benefit included in his estate.

This is the case with Shumate's CFC plan benefit. The CFC plan's termination, July 19, 1984, (J.A. 70, 71, 350) predates Shumate's entry into liquidation under Chapter 7. At the time Shumate's bankruptcy estate became eligible for liquidation, his right to the distribution from the terminated CFC Plan was fixed and simply awaiting distribution. He had a present right to all of the benefit which, as a matter of course, was reduced to cash.

As Witlin and related cases indicate, such a benefit right from a terminated plan in pay status at the time of bankruptcy was included in the bankruptcy estate under pre-Code law. Following the rule of Dewsnup and Midlantic National Bank, since there is no Bankruptcy Code provision or legislative history negating this practice, it is valid bankruptcy law today to include the CFC plan benefit in the bankruptcy

estate.

CONCLUSION

For the reasons cited by the Trustee in his brief and reply brief, the Trustee respectfully asks that the decision of the Court of Appeals be reversed and judgment entered in favor of the Trustee that he is entitled to Shumate's CFC Plan benefits as a nonexempt asset of the bankruptcy estate.

Respectfully submitted,

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No. 91-913

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE, PETITIONER

v.

JOSEPH B. SHUMATE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the anti-alienation provision of the Employee Retirement Income Security Act, which shields pension plans from claims of creditors, is enforceable in a bankruptcy proceeding.

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INTEREST OF THE UNITED STATES

Petitioner, the trustee of respondent's bankruptcy estate, seeks to include respondent's pension in the estate and distribute it to respondent's creditors. As mandated by ERISA, respondent's pension plan contains a provision prohibiting the assignment or alienation of pension benefits. Thus, the issue is whether ERISA's anti-alienation requirement is to be given force in determining what is included in a bankruptcy estate.

The Department of the Treasury and the Department of Labor have substantial authority for the enforcement of the terms of ERISA. The Secretary of the Treasury is charged with interpreting and administering ERISA's anti-alienation provision and has promulgated a regulation construing the anti-alienation requirement. 26

C.F.R. 1.401(a)-13. The Treasury, through the Internal Revenue Service, also is responsible for monitoring the tax-qualified status of pension plans, which may be affected by the assignment of plan benefits to bankruptcy trustees. In addition, the Secretary of Labor has authority to bring civil actions to ensure that fiduciaries of pension plans that are subject to ERISA comply with the terms of the Act, including the prohibition on alienation or assignment of plan benefits. 29 U.S.C. 1132(a)(5). The interpretation of ERISA's anti-alienation requirement therefore implicates basic ERISA policies that affect the agencies' enforcement of the Act.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of ERISA, the Bankruptcy Code, and the Internal Revenue Code, along with the IRS's anti-alienation regulation, are reprinted in the appendix to this brief.

STATEMENT

1. Coleman Furniture Corporation established a Pension Plan that satisfied all applicable requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and qualified for favorable tax treatment under the Internal Revenue Code. In particular, the Pension Plan complied with Section 206(d)(1) of ERISA, 29 U.S.C. 1056(d)(1), which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[1] Respondent Joseph B. Shumate, Jr., was associated with Coleman Furniture for more than 30 years. J.A. 14. After 1977, Shumate

[1] The Internal Revenue Code similarly provides as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits under the plan may not be assigned or alienated." 26 U.S.C. 401(a)(13).

controlled 96% of Coleman Furniture's stock and, from 1979 until early 1983, he served as president and chairman of the board of directors. J.A. 119-124. As an employee of Coleman Furniture, Shumate participated in the Pension Plan and his interest in the Plan has been valued at $250,000. J.A. 92-94.

Coleman Furniture experienced financial difficulties and, in November of 1982, the corporation filed a petition for relief under Chapter 11 of the Bankruptcy Code. The case soon was converted to a Chapter 7 proceeding and a trustee, Roy V. Creasy, was appointed. J.A. 13. Shumate then filed a Chapter 11 petition in his individual capacity in June of 1984, and his case also was converted to a Chapter 7 proceeding. Petitioner John R. Patterson was appointed as the trustee presiding over Shumate's personal bankruptcy. J.A. 18.

The trustee for the Coleman Furniture bankruptcy initiated an action in district court in which he sought and ultimately obtained approval to terminate the Pension Plan. See *Creasy* v. *Coleman Furniture Corp.*, 763 F.2d 656 (4th Cir. 1985). The trustee then proceeded to terminate and liquidate the Pension Plan, a process that was completed, for the most part, by the end of 1987. J.A. 8, 26-27. As a result, approximately 400 participants in the Pension Plan, except Shumate, received full termination distributions from Coleman Furniture's bankruptcy estate. Pet. App. 4a.

In April of 1987, petitioner, the trustee in Shumate's case, filed an action—referred to as a turnover action—to recover Shumate's pension benefits for his personal bankruptcy estate. J.A. 18-19.[2] The turnover proceeding was subsequently consolidated with a pre-existing action

[2] Because the scope of the bankruptcy estate is determined as of the time a bankruptcy petition is filed, 11 U.S.C. 541(a)(1), and the Pension Plan was not terminated until after Shumate filed his bankruptcy petition, whether Shumate's pension benefits are included in the bankruptcy estate is unaffected by the Plan's termination.

that Shumate had brought to compel Coleman Furniture's trustee to pay his interest in the Pension Plan to him. J.A. 7-10; Pet. App. 52a-57a. Shumate argued that his interest in the Pension Plan was excluded from his bankruptcy estate pursuant to 11 U.S.C. 541(c)(2), which excludes property that is subject to transfer restrictions that are enforceable under "applicable nonbankruptcy law." The "applicable nonbankruptcy law" on which Shumate relied was ERISA's anti-alienation provision.

Alternatively, Shumate maintained that even if his interest in the Plan was not excluded from the bankruptcy estate under Section 541(c)(2), he was entitled to an exemption for his pension benefits under 11 U.S.C. 522(b)(2)(A), which provides for the exemption of "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law." Shumate again relied on ERISA's anti-alienation provision as the basis for his argument that his pension is "exempt under Federal law" within the meaning of Section 522(b)(2)(A).

2. The district court held that Shumate's interest in the Pension Plan was included in the bankruptcy estate under Section 541 and was not exempt under Section 522. Pet. App. 18a-46a. With respect to whether a pension is included in a bankruptcy estate, the court rejected Shumate's argument that ERISA constitutes "applicable nonbankruptcy law" under Section 541(c)(2). It instead agreed with those courts that have "interpreted the phrase 'nonbankruptcy law' to mean state law." Pet. App. 26a. The court accordingly turned to Virginia law and held that Shumate's interest did not qualify for protection as a spendthrift trust under Va. Code Ann. § 55-19 (Michie 1986) because Shumate had a controlling interest in Coleman Furniture. Pet. App. 36a-38a.

The district court then proceeded to reject respondent's alternative argument that his interest in the Plan was "exempt under Federal law" within the meaning of Section 522(b)(2)(A). Pet. App. 41a-45a. The court

reasoned that "the House and Senate reports contain a list of property that can be exempted under federal laws," that ERISA is "conspicuously absent" from that list, and that the federal laws mentioned related to interests that were "peculiarly federal in nature," while "ERISA regulates private employer pension systems." *Id.* at 44a, quoting *Lichstrahl* v. *Bankers Trust*, 750 F.2d 1488, 1491 (11th Cir. 1985). Accordingly, the court ordered that "Shumate's interest in the Coleman Furniture Corporation Pension Plan" be paid to the trustee of Shumate's bankruptcy estate. Pet. App. 54a.

3. The court of appeals reversed. Pet. App. 1a-17a. The court found that the terms of the Pension Plan included an anti-alienation clause as required by ERISA. The court therefore held, in accordance with its prior decision in *Anderson* v. *Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), that Shumate's interest in the Pension Plan was excluded from his bankruptcy estate under Section 541(c)(2) of the Bankruptcy Code. Section 541(c)(2) honors transfer restrictions that are enforceable under "applicable nonbankruptcy law," and the court concluded that this language clearly encompasses ERISA: "'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase 'applicable nonbankruptcy law' . . . suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law." Pet. App. 7a-8a, quoting 907 F.2d at 1477.

The court further found that its "holding is consistent with the clear intent of ERISA and the Bankruptcy Code." Pet. App. 13a. Relying on this Court's precedents, the court of appeals reasoned that "Congress passed ERISA to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Ibid.*, quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). The court of appeals also

relied on *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), where this Court held that ERISA's anti-alienation provision precluded a union from attaching a union official's pension benefits to recover money the official had embezzled from the union. Pet. App. 14a. The court therefore concluded that Shumate's pension account also should not be distributed among his debtors in bankruptcy proceedings, "because § 541 mandates that where trusts contain enforceable restrictions on transfer of a beneficial interest, those restrictions must be recognized in bankruptcy and there operate to exclude the interest from the debtor's estate." *Id.* at 15a. The court of appeals accordingly did not reach the question of whether Shumate's plan interest was exempt under Section 522.

SUMMARY OF ARGUMENT

There is no dispute that ERISA ordinarily forbids the trustee of a pension plan from conveying a beneficiary's interest in the plan to any creditor, even if *requested* to do so by the beneficiary. Petitioner nevertheless asks this Court to create an implied exception to this rule against alienation, and to require involuntary conveyance of pension interests to bankruptcy trustees for the purpose of discharging the claims of creditors. Nothing in the statutory language of ERISA or the Bankruptcy Code, however, suggests that Congress intended that debtors would forfeit the ERISA-mandated protection of their pension benefits when they declare bankruptcy.

A. The literal language and purposes of ERISA compel the interpretation adopted by the court of appeals in this case. Section 206(d)(1) of ERISA provides that pension benefits "may not be assigned or alienated," 29 U.S.C. 1056(d)(1), and trustees who violate this prohibition are subject to suits for damages and equitable relief under ERISA, 29 U.S.C. 1132(a)(3) and (5). The statutory language makes no exception favoring creditors in bankruptcy proceedings, and this Court has already declined to create implied exceptions to ERISA's anti-alienation rule. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

The purpose of ERISA's prohibition on voluntary and involuntary alienation—conserving plan benefits for the beneficiary's retirement—is also fully implicated in the context of bankruptcy proceedings. If the debtor's pension benefits are used to discharge claims of creditors in bankruptcy, they simply will not be available for retirement, and that is the very result Congress sought to avoid.

B. The Bankruptcy Code also provides, consistent with ERISA, that a debtor's beneficial interest in a trust is excluded from the bankruptcy estate whenever "applicable nonbankruptcy law" would otherwise prevent the transfer of that interest. 11 U.S.C. 541(c)(2). The court of appeals correctly held in this case that there is simply no way to read the phrase "applicable nonbankruptcy law" to exclude ERISA's restriction against alienation, or to refer only to "state spendthrift trust law," as petitioner contends. See Pet. App. 15a-16a.

Petitioner's reliance on the legislative history and the language of the exemption section of the Bankruptcy Code for such a restrictive interpretation is misplaced. The legislative history in fact demonstrates a congressional intent to recodify the rule adopted under the prior Bankruptcy Act, which enforced restrictions on alienation that were recognized under either state or federal law.

Similarly, the fact that one section establishing an exemption for property otherwise included in the estate, 11 U.S.C. 522(d)(10)(E)(iii), makes reference to qualified ERISA pension plans, is also fully consistent with our interpretation of the Bankruptcy Code. Certain categories of tax-qualified pension plans, those established by governmental entities and churches, are not required to incorporate anti-alienation clauses. 29 U.S.C. 1003(b)(1);

26 C.F.R. 1.401(a)-13(a). Such plans accordingly would not be excluded from the bankruptcy estate under "applicable nonbankruptcy laws" within the meaning of Section 541(c)(2). The exemption set forth in Section 522(d) therefore serves to enlarge the protections afforded to such plans, thereby demonstrating that the section is not partially superfluous.

C. The court of appeals' interpretation reconciles coordinate federal statutes without undermining the purposes of either law. Adoption of petitioner's restrictive reading, in contrast, would defeat ERISA's command that claims of creditors must always be subordinated to the debtor's need for pension benefits at the time of retirement. It would also defeat congressional intent to establish a uniform federal rule governing the alienation of ERISA plan benefits, since protection of those benefits would depend upon whether state law happened to make the anti-alienation provision enforceable. In the end, petitioner would have this Court conclude that Congress sought to give pension benefits held in an ERISA qualified trust less protection than pension benefits held in a state spendthrift trust. There is no reason whatsoever to adopt such a strained interpretation of the law.

ARGUMENT

THE TERMS OF ERISA AND THE FEDERAL BANKRUPTCY CODE SHIELD RESPONDENT'S PENSION BENEFITS FROM BANKRUPTCY CREDITORS

The dispositive question in this case is whether ERISA's prohibition against the assignment or alienation of pension benefits, 29 U.S.C. 1056(d)(1), must be honored in bankruptcy proceedings. The Bankruptcy Code provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title," 11 U.S.C. 541(c)(2), and the court of appeals concluded that ERISA is "applicable nonbankruptcy law." It accordingly held that respondent's pension benefits are excluded from his bankruptcy estate. Accord *Velis* v. *Kardanis*, 949 F.2d 78 (3d Cir. 1991); *Forbes* v. *Lucas*, 924 F.2d 597 (6th Cir.), cert. denied, 111 S. Ct. 2275 (1991); *Gladwell* v. *Harline*, 950 F.2d 669 (10th Cir. 1991).

Petitioner, the trustee of respondent's bankruptcy estate, urges this Court to reject the court of appeals' straightforward interpretation of ERISA and the Bankruptcy Code, and to instead read the phrase "applicable nonbankruptcy law" to refer solely to state spendthrift trust law. Br. 49. That interpretation was first advanced in *Goff* v. *Taylor*, 706 F.2d 574 (5th Cir. 1983). Accord *Samore* v. *Graham*, 726 F.2d 1268 (8th Cir. 1984), *Daniel* v. *Security Pacific National Bank*, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986), and *Lichstrahl* v. *Bankers Trust*, 750 F.2d 1488 (11th Cir. 1985). See also *Regan* v. *Ross*, 691 F.2d 81, 85 (2d Cir. 1982). The United States agrees with the court below that the *Goff* interpretation is inconsistent with the literal language of ERISA as well as the Bankruptcy Code, and would nullify central terms of ERISA's scheme to protect pension plan benefits.

A. ERISA's Anti-Alienation Rule Is An Enforceable Restriction On The Transfer Of Pension Benefits And Does Not Make Any Exception For Bankruptcy Proceedings

1. The literal terms of ERISA do not permit the trustee of a pension plan to transfer or assign plan benefits to a bankruptcy trustee. A beneficiary's interest in a pension plan is generally subject to transfer restrictions by virtue of Section 206(d)(1) of ERISA, 29 U.S.C. 1056(d)(1), which provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [3] The coordinate section of the Internal Revenue Code provides as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. 401(a)(13) (ERISA § 1021(c)). In addition, the Treasury Department has promulgated a regulation, 26 C.F.R. 1.401(a)-13(b)(1), specifying that pension benefits held in trust are not subject to various kinds of attachment by creditors.[4]

[3] Section 206(d)(1) is part of Title I of ERISA, which governs "protection of employee benefit rights." A number of types of employee benefit plans are excepted from coverage under Title I of ERISA, including "governmental plan[s]" and "church plan[s]." 29 U.S.C. 1003(b)(1) and (2); see 29 U.S.C. 1002(32) and 1002(33) (defining "governmental plan" and "church plan"). Accordingly, pension plans sponsored by government agencies and churches are not required to include anti-alienation clauses.

[4] The regulation states that "[a] trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. 1.401(a)-13(b)(1). In light of the statutory exclusion of governmental plans and church plans from coverage under Title I of ERISA, the regulation provides that it does not apply to such plans. *Id.* § 1.401(a)-13(a). The regulation also permits alienation to satisfy a federal tax levy under Section 6331 of the Internal Revenue Code or a judgment in favor of the United States resulting from an unpaid tax assessment. *Id.* § 1.401(a)-13(b)(2).

ERISA requires plan trustees to adhere to these anti-alienation provisions. Under 29 U.S.C. 1104(a)(1)(D), the plan trustee must discharge his duties "in accordance with the documents and instruments governing the plan," and is subject to suit for any violation of the anti-alienation rule. The Secretary of Labor, a plan participant or beneficiary, or a plan fiduciary may bring a civil action to enjoin any violation of the anti-alienation requirement, to recover benefits due under a plan, and to seek reimbursement for the plan from fiduciaries who violated the requirements of the statute or the terms of a plan by alienating benefits held in trust. See 29 U.S.C. 1132(a)(3) and (5).[5]

It has therefore been firmly established outside the bankruptcy context that general creditors—even those who have been criminally wronged by the debtor—may not reach pension benefits properly held in trust by a pension fund containing an anti-alienation provision mandated by ERISA. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). See also *Smith* v. *Mirman*, 749 F.2d 181, 183 (4th Cir. 1984) (an employee's accrued benefits under a qualified plan may not be reached by judicial process in aid of a third party

[5] In addition, the IRS has taken the position that the transfer of a beneficiary's interest in a pension plan to a bankruptcy trustee would disqualify the plan from taking advantage of the preferential tax treatment available under ERISA. See *Forbes* v. *Lucas*, 924 F.2d 597, 603 (6th Cir.), cert. denied, 111 S. Ct. 2275 (1991); *Anderson* v. *Raine (In re Moore)*, 907 F.2d 1476, 1481 (4th Cir. 1990); *McLean* v. *Central States, Southeast & Southwest Areas Pension Fund*, 762 F.2d 1204, 1206 (4th Cir. 1985). However, the IRS has refrained from disqualifying plans on that basis in light of the conflict as to whether pension benefits are excluded from the bankruptcy estate under 11 U.S.C. 541(c)(2). The IRS may continue to exercise its enforcement discretion in that manner in circuits that have rejected the Service's position on the question presented in this case pending resolution of the conflict by this Court.

creditor); *Tenneco, Inc.* v. *First Virginia Bank*, 698 F.2d 688, 689-690 (4th Cir. 1983); *General Motors Corp.* v. *Buha*, 623 F.2d 455, 463 (6th Cir. 1980) (pension plan benefits protected against garnishment by tort judgment creditor). There is no reason to apply a different rule here, because none of the provisions governing alienation of ERISA plan benefits includes any exception that would permit alienation in favor of a bankruptcy trustee. The literal language of ERISA therefore serves to bar the trustee of an ERISA plan from making the transfer sought by the petitioner in this case.

2. The purposes of ERISA's anti-alienation provisions apply with full force in the context of bankruptcy. ERISA's restriction on alienation protects vested benefits from both voluntary and involuntary encroachments and ensures that an employee's accrued pension benefits will actually be available for retirement. As this Court has noted on a number of occasions, Congress passed ERISA to guarantee that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). See also *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 214 (1986). This Court has also stated that ERISA's anti-alienation rule furthers this purpose: "Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

It simply makes no difference whether the pension plan trustee alienates pension benefits in favor of a judgment creditor, a lien holder, or a bankruptcy trustee. The result is the same—the benefits will not be available to the

employee at the time of his retirement. And that is the result Congress sought to prevent through adoption of a broad anti-alienation clause.

3. This Court has already refused to create implied exceptions to ERISA's anti-alienation rule. Instead, this Court held in *Guidry* that "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry*, 493 U.S. at 376.[6] In *Guidry*, this Court held that ERISA's anti-alienation provision shields plan benefits from creditors even where the equities strongly favor the creditor, and even where another federal statute arguably provides a basis for an exception to ERISA's anti-alienation rule. Noting that where Congress intended to create exceptions to ERISA's bar against the alienation of pension benefits it has very explicitly done so within ERISA itself, this Court declined to create an equitable exception to ERISA's rule against alienation. 493 U.S. at 376; see *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 838 (1988).[7]

The argument rejected by this Court in *Guidry* has substantial parallels to petitioner's argument in this case. Guidry, a union official and a trustee of the union's pension fund, pleaded guilty to embezzling union funds in violation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 501. The union therefore sought to impose a constructive trust on Guidry's pension account in order to further the remedial purposes of the LMRDA, which provides a labor organization with

[6] The Court noted, however, that Guidry had not been found to have breached his fiduciary duty to the union pension plan by embezzling from the union, so that the Court was not deciding whether a fiduciary could be ordered to transfer funds from his pension account to other pension accounts as a remedy for such a breach. 493 U.S. at 373-374.

[7] The Court was referring to 29 U.S.C. 1056(d)(3), which provides an express exception to ERISA's anti-alienation rule for satisfaction of qualified domestic relations orders relating to child support and alimony.

a private right of action to recover damages or obtain other appropriate relief from officials who violate the Act. 29 U.S.C. 501(b). This Court rejected that argument, which had been accepted by the lower court, based upon a specific directive from Congress: pension benefits are immune from alienation or assignment. This Court declined to override this directive in the absence of a clear statement from Congress. 493 U.S. at 375-376. As in *Guidry*, no such clear congressional statement can be found in this case.

B. The Bankruptcy Code Gives Effect to the Anti-alienation Provisions of ERISA

1. Section 541(c)(2) of the Bankruptcy Code provides, consistent with ERISA, that trust funds subject to enforceable transfer restrictions are not included in the bankruptcy estate. Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. 541(c)(2). A pension fund that was established in compliance with ERISA is a "trust," see 29 U.S.C. 1103; 26 U.S.C. 401(a), and as shown previously, ERISA's restrictions against alienation are "enforceable" under 29 U.S.C. 1132(a)(3) and (5). Section 541(c)(2)'s reference to "applicable nonbankruptcy law" is unqualified and contains no reference to state law or, more particularly, to state spendthrift trust law. Following this Court's "first canon" of statutory interpretation, a straightforward reading of the phrase "applicable nonbankruptcy law" necessarily encompasses federal as well as state law. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992), quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

Reading Section 541(c)(2) to encompass both federal and state laws is also consistent with the use of the phrase "applicable nonbankruptcy law" in other sections

of the Bankruptcy Code. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983) (recognizing the principle of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute). In numerous places, unless otherwise limited by the text, the term "applicable nonbankruptcy law" refers to federal as well as state law.[8] As the Fourth Circuit noted in *In re Moore*, it would be "incongruous to give the same phrase in § 541(c)(2) a narrower construction than the identical phrase in other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute." 907 F.2d at 1478.

Conversely, other portions of the Bankruptcy Code demonstrate that, when Congress intended to refer exclusively to state law, it did so explicitly. See, *e.g.*, 11 U.S.C. 109(c)(2) (entity may be a debtor under Chapter 9 if authorized "by State law"); 11 U.S.C. 522(b)(1) (election of exemptions controlled by "State law that is applicable to the debtor"); 11 U.S.C. 523(a)(5) (a debt for alimony, maintenance, or support determined "in accordance with state or territorial law" is not dischargeable); 11 U.S.C. 903(1) ("State law prescribing a method of composition of indebtedness" is not binding on nonconsenting creditors); see also 11 U.S.C. 362(b)(12); 11 U.S.C. 1145(a). Accordingly, petitioner's contention that the phrase "applicable nonbankruptcy law" is limited to

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[8] See, *e.g.*, 11 U.S.C. 1125(d) ("otherwise applicable nonbankruptcy law" includes federal securities law), see *In re The Stanley Hotel, Inc.*, 13 B.R. 926, 931 (Bankr. D. Colo. 1981); 11 U.S.C. 108(a) ("applicable nonbankruptcy law" includes, *inter alia*, the Racketeer Influenced and Corrupt Organization Act and the Interstate Commerce Act), see *In re Ahead By a Length, Inc.*, 100 B.R. 157, 162-163 (Bankr. S.D.N.Y. 1989), and *Motor Carrier Audit & Collection Co.* v. *Lighting Products, Inc.*, 113 B.R. 424, 425-426 (N.D. Ill. 1989); 11 U.S.C. 108(b) ("applicable nonbankruptcy law" includes the Federal Tort Claims Act), see *Eagle-Picher Industries, Inc.* v. *United States*, 937 F.2d 625, 639-640 (D.C. Cir. 1991).

state spendthrift trust law is unsupported by the language of Section 541(c)(2), which neither states nor implies any such limitation.[9]

2. Petitioner, and the courts that have limited "applicable nonbankruptcy law" to state spendthrift trust law, have purported to rely on the legislative history of Section 541(c)(2). See Br. 38-42; *Goff*, 706 F.2d at 581-582; *Graham*, 726 F.2d at 1271-1272. As an initial matter, resort to the legislative history is improper where the statute is not ambiguous. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992), slip op. 5. But even if it were proper to advert to the legislative history, the limited history pertaining to Section 541(c)(2) is more consistent with the statutory interpretation adopted by the court of appeals in this case.

a. The House Report stated that the term "applicable nonbankrupcy law" in Section 541(c)(2) "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law," and added that Section 541(c)(2) "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." H.R. Rep. No. 595, 95th Cong., 1st Sess. 369, 176 (1977). The Senate Report similarly noted that Section 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust." S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978). Those passages indicate Congress's intent to protect spendthrift trusts, and other passages in legislative history pertaining to ERISA reveal that Con-

[9] Petitioner's observation (Br. 35) that in Bankruptcy Code Section 522(b)(2)(B) the phrase "applicable nonbankruptcy law" is effectively restricted to state law does not advance his position. The reference in Section 522(b)(2)(B) is effectively limited to state law because the phrase is qualified by a reference to the law pertaining to tenancies by the entireties and there is no similar language in Section 541(c)(2) restricting "applicable nonbankruptcy law" to state law, much less state spendthrift trust law.

gress in fact has equated the ERISA anti-alienation requirement with a "spendthrift" clause.[10] Moreover, these passages should not be read to limit the scope of "applicable nonbankruptcy law" merely because they illustrate congressional intent by pointing to a common example—spendthrift trusts that are enforceable under state law.

b. The legislative history also shows that Congress intended Section 541(c)(2) to preserve prior law with respect to restrictions on alienability and assignment. Prior law would have protected the pension plan interests in issue, providing further support for the lower court's construction of Section 541(c)(2).

Prior to the adoption of Section 541(c)(2), interests protected by an enforceable anti-alienation provision were excluded from the bankruptcy estate under Section 70a of the Bankruptcy Act. 11 U.S.C. 110(a) (1976). See *Danning* v. *Lederer*, 232 F.2d 610 (7th Cir. 1956); *Jones* v. *Harrison*, 7 F.2d 461 (8th Cir. 1925), cert. denied, 270 U.S. 652 (1926). In addition, restrictions on alienation were respected by Section 70a whether they were enforceable under state spendthrift trust law or federal law. 4A *Collier on Bankruptcy* para. 70.26, at 365-366 (14th ed. 1978). Thus, for example, the "headright" of an Osage Indian—*i.e.*, oil and gas rights held in trust by the United States—did not become property of the Indian's bankruptcy estate because federal law imposed restrictions on transfer and seizure of those assets. *Taylor* v. *Tayrien*, 51 F.2d 884 (10th Cir.), cert. denied, 284 U.S. 672 (1931).[11]

[10] In Section 204(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, Congress amended Internal Revenue Code Section 401(a)(13) to exempt a "qualified domestic relations order" from ERISA's restrictions on alienation of benefits. 98 Stat. 1445. In the technical explanation which accompanied the Act, the Senate Committee on Finance specifically referred to the anti-alienation provision of Section 401(a)(13) of the Internal Revenue Code and to the parallel provision in Section 206(d)(1) of ERISA as "spendthrift provisions." 130 Cong. Rec. 22,126-22,127 (1984).

[11] After enactment of the current Bankruptcy Code, but in cases decided under the former Act, a few courts also had occasion to

The history leading to the adoption of the current law reveals a congressional intent to leave these rules undisturbed. The Commission on Bankruptcy Laws, established in 1970 to study the former Bankruptcy Act, proposed a modification of the spendthrift trust rules that was ultimately rejected in favor of the prior law. The Commission recommended that restrictions on a debtor's beneficial trust interests that were "enforceable under applicable nonbankruptcy law" should only be enforceable in bankruptcy to the extent reasonably necessary for support of the debtor and his dependents. *Report of the Commission of the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 1, at 197 (1973). *Id.* Pt. 2, § 4-601(b), at 147-148. The House version of the bill that was ultimately enacted as the new Bankruptcy Code did not adopt this aspect of the Commission's recommendation. The law adopted did not limit the exclusion of protected trust interests to the amount necessary for support. See H.R. Rep. No. 595, *supra*, at 176, 369; S. Rep. No. 989, *supra*, at 83. Thus, it is clear that Bankruptcy Code Section 541(c)(2) was intended to continue *in full* the protection of interests in spendthrift trusts that was available under the prior Bankruptcy Act.

3. Petitioner and the courts that have restricted "applicable nonbankruptcy law" to state spendthrift trust law have also relied on the misimpression that reading Section 541(c)(2) to mean what it says would render one of the Bankruptcy Code's exemption provisions, 11 U.S.C. 522(d)(10)(E)(iii), partially superfluous. See Br. 24-33; *Goff*, 706 F.2d at 582; *Heitkamp* v. *Dyke*, 943 F.2d 1435, 1442-1443 & n.20 (5th Cir. 1991); cf. *Regan* v. *Ross*, 691 F.2d 81 (2d Cir. 1982). In fact, there is no

consider, and recognize, interests in pension plans subject to ERISA as interests that were outside the scope of the bankruptcy estate. See *Turpin* v. *Wente*, 644 F.2d 472 (5th Cir. 1981); *Mason* v. *Eastman Kodak Co. (In re Parker)*, 473 F. Supp. 746 (W.D.N.Y. 1979). But see *Judson* v. *Witlin*, 640 F.2d 661 (5th Cir. 1981).

reason to depart from the language Congress used in order to avoid a conflict between the exclusion and exemption provisions, because each provision has force when read together properly.

a. The Bankruptcy Code provides that certain property includable in the bankruptcy estate under Section 541 may be exempted from the estate pursuant to a complex set of provisions detailed in Section 522. In some States, debtors may choose between two different lists of exemptions: (1) the exemptions referred to as the "laundry list," set forth in Section 522(d); or (2) the exemptions available under Section 522(b).[12] In the majority of States, including Virginia, which is respondent's residence, debtors may not elect the exemptions set out in the laundry list under Section 522(d), but are restricted to the exemptions allowed under Section 522(b). See 11 U.S.C. 522(b)(1); Va. Code Ann. § 34-31 (Michie 1986); 3 *Collier on Bankruptcy para.* 522.02 n.4a (15th ed. 1991).

Even though the laundry list of exemptions under 522(d) is not applicable to most bankruptcies—including respondent's—petitioner claims (Br. 26) that the terms of Section 522(d) disclose an intent to make all ERISA benefits includable in the estate. Section 522(d)(10)(E) provides that a debtor who chooses the laundry list of exemptions (if allowed to do so under state law), may exempt his right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract * * *, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless— * * * (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1986 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409)." If interests in qualified pension plans are excluded from the bankruptcy estate under

[12] Section 522(b)(2)(A) provides for the exemption of "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law."

Section 541(c)(2), petitioner contends, there would be no need for a reference to pension plans that qualify for preferential tax treatment under Section 401(a) of the Internal Revenue Code in the Bankruptcy Code's exemption provision. See Br. 29-31.

It should be noted at the outset that plans that qualify for preferential tax treatment under Section 408—individual retirement accounts (IRAs)—are not required to contain anti-alienation provisions.[13] An IRA therefore would not be protected from alienation under "applicable nonbankruptcy law," but the exemption in Section 522(d) would nevertheless serve to *enlarge* the protection afforded to the IRA assets when the debtor declares bankruptcy. It would be counter-intuitive to read Section 522(d), which provides increased protection for plans that are not required to contain an anti-alienation clause, to *reduce* the protection afforded to the plans that Congress required to be protected from assignment or alienation.

Moreover, even the Section's reference to pension plans that qualify under Section 401(a) does not render the section partially superfluous. Not all pension plans that qualify for favorable tax treatment under Section 401(a) contain an anti-alienation provision, and the exemption of 522(d) would therefore serve to enlarge the protection afforded those plans as well. See *Tatge* v. *Cheaver* (*In re Cheaver*), 121 B.R. 665, 665-666 (Bankr. D.D.C. 1990); Seiden, *Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?*, 61 Am. Bankr. L.J. 301, 317-318 (1987); Arnopol, *Including Retirement Benefits in a Debtor's Bankruptcy Estate: A Proposal for Harmonizing ERISA and the Bankruptcy Code*, 56 Mo. L. Rev. 491, 552-553 (1991). As noted previously (see notes 3, 4, *supra*), two significant categories of pension plans, those established by governmental entities and churches, may qualify for preferential tax treatment without complying with ERISA's anti-alienation requirement. See 29 U.S.C. 1003(b)(1) and (2); 26 C.F.R. 1.401(a)-13(a).[14] In short, since these pension plans qualify for favorable tax treatment under Section 401(a) of the Internal Revenue Code but are not protected against alienation under "applicable nonbankruptcy law," the court of appeals' interpretation of Section 541(c)(2) does not partially nullify Section 522(d)(10)(e)(iii). Rather, under the court of appeals' construction of the statute, Section 522(d)(10)(e)(iii) increases the protections afforded to participants in governmental plans and church plans.

[13] Pension plans that qualify for preferential tax treatment under 26 U.S.C. 408 (individual retirement accounts) and 409 (which covered retirement bonds at the time the Bankruptcy Code was enacted) are specifically excepted from ERISA's anti-alienation requirement by 29 U.S.C. 1051(6).

b. Unlike petitioner, amicus David B. Tatge, Trustee, recognizes that some types of ERISA pension plans are not required to include anti-alienation clauses. He nevertheless contends that the court of appeals' interpretation is contrary to various shreds of legislative history bearing on Congress's intent in enacting Section 522(d)(10)(E).

Amicus relies primarily on a note explaining the exemption provision in the proposal of the Commission on the Bankruptcy Laws. Br. 10-11, quoting Note 8 to

[14] Because the provisions of Subchapter I of ERISA do not apply to governmental plans and church plans, they are treated differently from plans established by private companies in a number of respects. For example, in addition to not being subject to the anti-alienation rule, governmental plans and church plans are not required to comply with ERISA's reporting and disclosure requirements or the statute's vesting and participation requirements. Governmental plans and church plans are excepted from these requirements whether they establish a trust fund or purchase annuity contracts, as provided in 26 U.S.C. 403. See 26 U.S.C. 410(c)(1)(A) and (B), 411(e)(1)(A) and (B); see also *Feinstein* v. *Lewis*, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979) ("[p]lans established by state and local governments are generally excluded from coverage under ERISA because of concerns of federalism").

§ 4-503 of the Commission Report. That note supports the view that the drafter thought that interests in qualified plans sponsored by private companies would be partially exempted from the bankruptcy estate. Putting aside the question whether it would be proper to rewrite Section 541(c)(2) based upon the explanatory note to a Commission proposal, there is no reason to impute the drafter's intention to Congress because Congress in fact revised the Commission's proposal in material respects.[15]

Amicus also notes that a witness at a hearing on the Commission's proposal stated that the Commission's bill allowed a partial exemption for pension benefits, whereas ERISA precluded any alienation of pension benefits. Br. 12, quoting *Hearings on S. 235 and 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 664, 678 (1975) (statement of John Creedon of the American Life Insurance Association). Perhaps that testimony prompted Congress to resolve the conflict between the Commission's proposal and ERISA by excluding pension benefits subject to a mandatory anti-alienation clause altogether. In any event, as enacted, Section 541(c)(2) and Section 522(d)(10)(E) are fully compatible with each other and with ERISA's anti-alienation provision.

c. The court of appeals properly rejected petitioner's argument even though it may not have appreciated that Section 541(c)(2) and Section 522(d)(10)(E) are fully

[15] The Commission proposed in § 4-601(b) to exclude interests of the debtor "in a trust created for his support." A pension trust, which might have been created before a participant was employed by the sponsoring company, would not normally have been created for the debtor's support. Therefore, under the Commission's proposal, pension benefits would have been subject to partial exemption but not exclusion. However, Congress deleted "created for his support" from the Commission's proposal and broadly excluded property held "in a trust" in Section 541(c)(2), so the law actually adopted does exclude pension benefits.

compatible. The Bankruptcy Code is not a model of precise draftsmanship, *Dewsnup* v. *Timm*, 112 S. Ct. 773, 778 (1992), and the Code's exemption provision is particularly complex. In a recent decision, this Court refused to depart from the clear language of 28 U.S.C. 158(d), which governs appellate jurisdiction in bankruptcy cases, based upon an overlap between Section 158(d) and 28 U.S.C. 1291, which governs appellate jurisdiction generally. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992).

In reasoning applicable to this case, the Court said that "[b]ecause giving effect to both §§ 1291 and 158(d) would not render one or the other wholly superfluous, we do not have to read § 158(d) as precluding courts of appeals, by negative implication, from exercising jurisdiction under § 1291 over district courts sitting in bankruptcy." *Connecticut Nat'l Bank*, slip op. 4-5. Under no reading of the Bankruptcy Code is either Section 541(c)(2) or Section 522(d)(10)(E) rendered wholly superfluous, since there is no dispute that Section 522(d)(10)(E) exempts interests in pension plans that do not qualify for preferential tax treatment in some circumstances. Accordingly, even a partial overlap between Section 541(c)(2) and Section 522(d)(10)(E) would not provide an adequate basis to read "applicable nonbankruptcy law" to mean "state spendthrift trust law." But as we have explained, Section 541(c)(2) and Section 522(d)(10)(E) are nevertheless entirely compatible.[16]

[16] In this connection, we note that the Third Circuit did not adequately harmonize Section 541(c)(2) and Section 522(d)(10)(E) by reading the latter provision as relating only to distributions from a pension plan that the debtor has an immediate and present right to receive. See *Velis* v. *Kardanis*, 949 F.2d at 81-82. Even assuming that Section 522(d)(10)(E) can be read to protect distributions only, such a reading does not resolve the present issue. In our view, Section 541(c)(2) excludes from the bankruptcy estate the debtor's interest in a plan containing an anti-alienation clause mandated by ERISA; once the interest in the plan is excluded, distributions

4. If this Court agrees that respondent's pension benefits are excluded from his bankruptcy estate because the Pension Plan was subject to ERISA's anti-alienation rule, there is no need to consider whether those benefits are exempt under Section 522(b)(2)(A), which provides an exemption for "property that is exempt under Federal law, other than subsection (d) of this section." But it is instructive that the district court's conclusion that interests in pension plans are not "exempt under Federal law" rested on the fact that ERISA was not mentioned in the legislative history of Section 522(b). Pet. App. 44a; see S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), H.R. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977); see also *Lichstrahl*, 750 F.2d at 1491; *Graham*, 726 F.2d at 1274.[17] If we are correct that interests in

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under the plan are excluded as well and constitute part of the debtor's "fresh start" because, with a few exceptions not applicable in this Chapter 7 case, only interests of the debtor in property as of "the commencement of the case" go into the bankruptcy estate. 11 U.S.C. 541(a)(1). Thus, since respondent's interest in the Pension Plan is not included in his estate under Section 541(c)(2), there is no need to exempt distributions under the Plan that occurred after the filing of his bankruptcy petition.

Even in Chapters 12 and 13, where property of the estate includes property received by the debtor during the pendency of the case, Section 522(d)(10)(E) would not be necessary to protect distributions. Debtors in Chapters 12 and 13 are required only to commit their "disposable income," *i.e.*, amounts in excess of that which is "reasonably necessary * * * for the maintenance or support of the debtor or a dependent of the debtor," 11 U.S.C. 1225(b), 1325(b), and Section 522(d)(10)(E) by its terms provides an exemption only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

[17] As an example of the sort of property that is "exempt under Federal law" other than Section 522(d), the reports mentioned homestead land protected by 43 U.S.C. 175 (1976), which provided that "[n]o lands acquired under the provisions of the homestead laws * * * shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The other examples provided in the legislative history of Section 522 include some types of benefits that are protected by strong anti-

plans subject to ERISA's anti-alienation provision generally are excluded from the bankruptcy estate, there was simply no pressing need to list ERISA in the legislative history of Section 522. On the other hand, if we are wrong about the meaning of Section 541(c)(2), Congress's failure to mention ERISA in the legislative history of Section 522 still does not provide an adequate basis to conclude that ERISA is not "Federal law." ERISA most definitely is a federal law. *In re Komet*, 104 B.R. 799, 808 (Bankr. W.D. Tex. 1989).

C. Excluding Respondent's Pension Benefits From His Bankruptcy Estate Harmonizes ERISA And The Bankruptcy Code

As the court of appeals stated, Pet. App. 16a, citing *Morton* v. *Mancari*, 417 U.S. 535 (1974), coordinate federal statutes should be read in harmony whenever possible. Indeed, when two federal statutes are capable of co-existence, it is the affirmative duty of the courts, absent clear direction to the contrary, to interpret the statutes so as to give effect to both. *Id.* at 551. Applying Bankruptcy Code Section 541(c)(2) according to its terms (and, thus, to exclude from the bankruptcy estate a debtor's interest in a pension plan that contains an anti-alienation clause mandated by ERISA) avoids a significant inroad on Congress's goal, manifest in Section 206(d)(1) of ERISA, of preserving retirement benefits from the demands of a participant's creditors. Thus, the court of appeals' decision in this case interprets

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alienation provisions, such as the provision prohibiting the alienation of benefits payable under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 916. However, although such benefits are protected by an anti-alienation provision, they are not held in trust, and would not be excluded from the bankruptcy estate pursuant to Section 541(c)(2) under our interpretation of that provision because it applies only to benefits held "in a trust."

ERISA's anti-alienation provision and the Bankruptcy Code in a manner that gives effect to both.[18]

On the other hand, petitioner's interpretation of Bankruptcy Code Section 541(c)(2) would nullify ERISA's anti-alienation provisions in situations where a pension plan did not meet state law requirements for a spendthrift trust. Petitioner's interpretation thus leads to the incongruous result that pension benefits subject to ERISA's anti-alienation rule are fully protected from creditors until the filing of a bankruptcy petition in federal court, at which time their protection becomes dependent on state law. See *John Hancock Mutual Life Insurance Co.* v. *Watson (In re Kincaid)*, 917 F.2d 1162, 1169-1170 (9th Cir. 1990) (Fletcher, J. concurring). Petitioner's interpretation thus creates an incentive for creditors to force debtors into involuntary bankruptcy proceedings in order to reach pension funds that otherwise would be protected. See *In re Moore*, 907 F.2d at 1480; *Gladwell*, 950 F.2d at 675. Furthermore, because petitioner's interpretation makes the application of ERISA's anti-alienation provision dependent on state law, it is contrary to ERISA's broader purpose of ensuring uniform treatment of pension plans throughout the country. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987).

An interpretation of one federal statute that so undercuts another is to be avoided, unless that is the clear intent of Congress. Such intent is not evident here, either in the Bankruptcy Code or in ERISA. By contrast, the natural reading of Section 541(c)(2) endorsed by the

[18] Contrary to petitioner's suggestion, Br. 15, 16, 20, 42-46, ERISA's preemption provision affords little guidance with respect to the proper resolution of the question presented in this case. Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that "[n]othing in this [Act] shall be construed to alter, amend, invalidate, impair, or supersede any law of the United States." But that merely begs the question: if "applicable nonbankruptcy law" includes ERISA, then ERISA does not interfere with the Bankruptcy Code.

court of appeals in this case avoids differential treatment of participants in pension plans containing the anti-alienation clause mandated by ERISA and gives force to such clauses.

As a frequent creditor in bankruptcy proceedings, the United States is not unmindful of the apparent unfairness of discharging debtors from their obligations while allowing the debtors to retain substantial assets.[19] However, this Court has already declined, under more compelling circumstances than those presented by the filing of a petition in bankruptcy, to carve out an equitable exception to ERISA's anti-alienation provision. See *Guidry*, 493 U.S. at 376. As this Court recognized, the imposition of safeguards against potential abuse of the bankruptcy forum is a task more properly undertaken directly by Congress.[20]

[19] It is possible for a debtor to build up a substantial interest in a pension plan that is subject to ERISA. However, it is not possible for a debtor quickly to transfer substantial assets into a pension plan in anticipation of bankruptcy because ERISA restricts the amounts that may be contributed annually to an individual's account. See, *e.g.*, 26 U.S.C. 415(c)(1).

[20] At present, several bills have been introduced to clarify this question. *E.g.*, S. 1985, 102d Cong., 2d Sess. § 202 (1992) (adding a third paragraph to Section 541(c) explicitly excluding from the estate "any rights of debtor" to various qualified plans).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

11 U.S.C. 522 provides in pertinent part:

* * * * *

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate * * *

(2) (A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days imediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place * * *.

* * * * *

(d) The following property may be exempted under subsection (b) (1) of this section:

* * * * *

(10) The debtor's right to receive—

* * * * *

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

11 U.S.C. 541(c)(2) provides:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

26 U.S.C. 401(a)(13) provides in pertinent part:

Assignment and alienation.—

(A) In general.—A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.—Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

29 U.S.C. 1003(b) provides in pertinent part:

The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26 * * *.

29 U.S.C. 1051 provides in pertinent part:

* * * * *

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

* * * * *

(6) an individual retirement account or annuity described in section 408 of Title 26, or a retirement bond described in section 409 of Title 26 (as effective for obligations issued before January 1, 1984) * * *.

29 U.S.C. 1056(d) provides in pertinent part:

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any

voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceeding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

26 C.F.R. 1.401(a)-13 provides in pertinent part:

(a) *Scope of the regulations.* This section applies only to plans to which section 411 applies without regard to section 411(e)(2). Thus, for example, it does not apply to a governmental plan, within the meaning of section 414(d); a church plan, within the meaning of section 414(e), for which there has not been made the election under section 410(a) to have the participation, vesting, funding, etc. requirements apply; or a plan which at no time after September 2, 1974, provided for employer contributions.

(b) *No assignment or alienation*—(1) *General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a

part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

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No. 91-913

In The Supreme Court of The United States

October Term, 1991

JOHN R. PATTERSON

Trustee, Petitioner,

v.

JOSEPH B. SHUMATE, JR.

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE DAVID B. TATGE, TRUSTEE, URGING REVERSAL AND REMAND

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF DAVID B. TATGE, TRUSTEE, URGING REVERSAL AND REMAND

Pursuant to Rule 37.4 of the Rules of the Court, Amicus Curiae David B. Tatge, Trustee, moves for leave to file the attached *amicus curiae* brief, urging REVERSAL and REMAND. Neither party has given Tatge the written consent to filing of an *amicus curiae* brief which he requested under Rule 37.3, requiring that this motion be filed.

Tatge is the Chapter 7 Trustee in Bankruptcy for debtor Valerie D. Cheaver in Case No. 90-00295, now pending before the United States Bankruptcy Court for the District of Columbia. Tatge also is the appellant in Appeal No. 91-7097, *David B. Tatge, Trustee v. Valerie D. Cheaver and The Medlantic Healthcare Group Cash Balance Retirement Plan,*

now pending before the United States Court of Appeals For The District of Columbia Circuit. This appeal was stayed on February 4, 1992 after this Court granted Certiorari in the instant case.

Under Medlantic's tax qualified pension plan, Cheaver has the right to demand payment in full of her vested benefits upon any voluntary termination of employment, even before normal or early retirement. Cheaver claimed exemption for her pension rights under the "federal" pension exemption statute, 11 U.S.C. §522(d)(10)(E). Tatge's appeal is from an unreported decision of the United States District Court for the District of Columbia, *Tatge v. Cheaver (In re Cheaver)*, C.A. 91-57 (D.D.C. May 29, 1991), which affirms a reported decision of the United States Bankruptcy Court for the District of Columbia *Tatge v. Cheaver (In re Cheaver)*, 121 Bankr. 665 (Bankr. D.D.C. 1990) dismissing an adversary proceeding for turnover of Cheaver's interest in the Medlantic's plan, on the basis that ERISA §206(d)(1) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code.

Tatge's brief supports the Petitioners' argument that ERISA §206(d)(1) is not "applicable nonbankruptcy law" for purposes of §541(c)(2), and that as a result a debtor's rights under ERISA pension plans are property of the bankruptcy estate. However, Tatge's position differs from that of the parties before the Court in that he urges that the difficult issue of whether ERISA represents "Federal law other than subsection (d)" for purposes of §522(b)(2)(A) (a provision applicable if "state" exemptions are utilized) be decided on remand. This issue was not addressed by the Fourth Circuit.

Tatge's brief raises issues and advances arguments concerning §541(c)(2) not raised or advanced by the Petitioner in the Petition For Writ Of Certiorari, the Respondent in Opposition to the Petition, or in Petitioner's Reply, namely:

- The term "applicable nonbankruptcy law" as used in §541(c)(*l*) of the Bankruptcy Code refers to "local rules of transferability", which strongly suggests that when Congress used the same term in §541(c)(2), it was referring to state law as well;

- §522(d)(10)(E), and in particular subsection (iii), demonstrates that rights under all pension plans which are tax qualified under §401(a) of the Internal Revenue Code, be included in the bankruptcy estate;

- Language from the Report of The Commission on Bankruptcy Laws of The United States establishes that §522(d)(10)(E) is not a "catchall" intended to apply only to government, church and nonqualified plans after most ERISA plans have previously been excluded from the estate under §541(c)(2);

- §522(d)(10)(E) is intended to exempt presently vested rights to plan benefits which are distributable only at a future time, requiring that these rights to corpus be exempt under §522(d)(10)(E) and not excluded under §541(c)(2);

- §522(b)(2)(B) establishes that the term "applicable nonbankruptcy law" is ambiguous, requiring review of the legislative history of §541(c)(2);

- A blanket exclusion for ERISA qualified pension plans under §541(c)(2) would be a significant change in pre-Code practice, and inconsistent with the legislative history;

- The Bankruptcy Code, like federal tax lien law, overrides ERISA anti-alienation clauses;

- Seven cases which establish that turnover of plan benefits to the trustee, where appropriate, will not disqualify the plan;

- ERISA does not pre-empt state law exemptions for ERISA qualified plan rights, overriding possible concerns that

including pension rights in the bankruptcy estate will force debtors to the Hobson's choice of electing "federal" exemptions so as to exempt their pension rights, and thereby losing valuable state law homestead and tenancy by the entirety exemptions, or vice versa; and

- Including ERISA pension rights as property of the estate will not conflict with ERISA's goal of uniformity.

While it is likely that some of the foregoing issues may be addressed by the parties in their briefs on the merits (because Movant has raised many of these issues and suggested arguments and authorities to Petitioner's counsel), Movant has no reason to believe that all of the foregoing issues will be addressed or, if addressed at all, that they will be fully presented. Each of the foregoing issues raised above should be considered by this Court in making its decision.

Finally, one of the major arguments supporting Petitioner's position with respect to §541(c)(2) concerns §522(d)(10)(E). That statute is not applicable to Mr. Shumate because Virginia is an "opt out" state. It is, however, directly applicable to the *Cheaver* case as the basis for Cheaver's asserted pension exemption. Movant should be heard on the §522(d)(10)(E) issue, and its relationship to §541(c)(2). Several of the foregoing issues and related arguments have not been fully considered by the lower courts because they arise only in the context of a case where federal exemptions are chosen by the debtor, and research has not revealed the strong comprehensive analysis which Tatge seeks to bring to the attention of this Court in his *amicus curiae* brief.

WHEREFORE, having shown a significant interest in the outcome of this case, *i.e.* the unique and important argument of a bankruptcy trustee in the circumstances of a debtor who chose "federal" exemptions, and an extensive analysis of questions of law and legal authorities that have not been raised by either party, Amicus Curiae Tatge prays that his motion for leave to file *amicus curiae* brief be GRANTED, and for such other and further relief as is just and proper.

Respectfully submitted,

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Dated: March 6, 1992

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF AMICUS CURIAE DAVID B. TATGE, TRUSTEE, URGING REVERSAL AND REMAND

INTEREST OF THE AMICUS CURIAE

Amicus Curiae David B. Tatge ("Tatge") is Trustee in Bankruptcy in *In re Valerie D. Cheaver*, Case No. 90-00295, filed under Chapter 7 of the Bankruptcy Code and now pending in the United States Bankruptcy Court for the District of Columbia. Pursuant to Rule 37.3 of the Supreme Court Rules Tatge sought, unsuccessfully, the consent of both parties to filing of an Amicus Curiae brief. Accordingly, Tatge's Motion For Leave To File Amicus Curiae Brief is filed under Rule 37.4 concurrently herewith.

Tatge is the appellant in Appeal No. 91-7097, *David B. Tatge, Trustee v. Valerie D. Cheaver and The Medlantic Healthcare Group Cash Balance Retirement Plan*, now pending before the United States Court of Appeals For The District of Columbia Circuit. This appeal was stayed on February 4, 1992 after this Court granted Certiorari in the instant case.

Under Medlantic's tax qualified pension plan, Cheaver has the right to demand payment in full of her vested benefits upon any voluntary termination of employment, even before normal or early retirement. Cheaver claimed exemption for her pension rights under the "federal" pension exemption statute, 11 U.S.C. §522(d)(10)(E). Tatge's appeal is from an unreported decision of the United States District Court for the District of Columbia, *Tatge v. Cheaver (In re Cheaver)*, C.A. 91-57 (D.D.C. May 29, 1991), which affirms a reported decision of the United States Bankruptcy Court for the District of Columbia *Tatge v. Cheaver (In re Cheaver)*, 121 Bankr. 665 (Bankr. D.D.C. 1990) dismissing an adversary proceeding for turnover of Cheaver's interest in the Medlantic's plan, on the basis that ERISA §206(d)(1) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code.

Tatge's brief, which supports a result not sought by Petitioner or Respondent, brings to the attention of the Court several relevant authorities not raised in either Patterson's Petition for Writ of Certiorari, Shumate's Brief in Opposition, or the Petitioner's Reply. Although Tatge supports the Petitioner's position that a debtor's rights under an ERISA pension plan are "property of the estate" in bankruptcy cases, he asserts, however, that whether ERISA is "other Federal law" which permits debtors choosing state exemptions to wholly exempt such benefits is not properly before this Court. Accordingly, Tatge urges REVERSAL AND REMAND.

If this Court concludes that ERISA pension rights are "property of the estate," the Fourth Circuit should on remand determine, in the first instance, whether debtors choosing state exemptions may wholly exempt such benefits solely by virtue

of the plan being ERISA-qualified. This Court's interpretation of the scope of §541(c)(2), however, will be more fully dispositive in *In re Cheaver*, because Ms. Cheaver chose "federal" exemptions under 11 U.S.C. §522(b)(1).

SUMMARY OF ARGUMENT

Under §541(a) and §541(c)(1) of the Bankruptcy Code (Title 11, U.S.C. §101, *et seq.*), except as provided in §541(c)(2), an interest of the debtor in property becomes property of the bankruptcy estate under §541(a)(1), 541(a)(2), or 541(a)(5), notwithstanding any provision in an agreement, transfer instrument or "applicable nonbankruptcy law" that restricts or conditions transfer of such interest by the debtor. For this purpose "property," except as provided in §541(b) and §541(c)(2) of the Bankruptcy Code, includes all legal and equitable interests of the debtor in property as of the commencement of the case.

Under §541(c)(2), "a restriction on the transfer of a beneficial interest by the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title" [title 11]. The issue before this Court is whether §206(d)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA," 29 U.S.C. §1001 *et seq.*) represents "applicable nonbankruptcy law" for purposes of §541(c)(2) of the Bankruptcy Code. The Fourth Circuit Court of Appeals held below that §206(d)(1) is "applicable nonbankruptcy law" and excluded from the bankruptcy estate Respondent Shumate's rights under the Coleman Furniture Company Pension Plan (the "CFC" Plan).

This was error. "Applicable nonbankruptcy law" for purposes of §541(c)(2) does not include §206(d)(1) of ERISA. Instead, "applicable nonbankruptcy law" means state spendthrift trust law. First, reference to the legislative history of §541(c)(*1*) in the Report of the Commission On Bankruptcy Laws of the United States establishes that the term "applicable nonbankruptcy law," the same term used in §541(c)(*2*), the provision here at issue, refers to "local rules of transferability." Applying well-accepted rules of statutory construction,

identical words used in different parts of the same act are intended to have the same meaning. This is particularly true where, as here, identical words are used in the same section of the same act. Thus, §541(c)(1) and (2) should be construed consistently. "Applicable nonbankruptcy law" means state law for purposes of §541, and ERISA pension rights are property of the bankruptcy estate.

The "plain meaning" of §522(d)(10)(E) of the Bankruptcy Code, and in particular §522(d)(10)(E)(iii), establishes clearly that Congress intended a debtor's rights under a plan tax qualified under §401(a) of the Internal Revenue Code – such as the CFC Plan – to come into the bankruptcy estate, and later be claimed as exempt, rather than to be excluded from the bankruptcy estate altogether under §541(c)(2).

The debtor's pension plan here is a §401(a) tax qualified plan. Under ERISA, it must contain an anti-alienation clause to maintain tax-exempt status. ERISA §206(d(1); 29 USC §1056 (d)(1); IRC §401(a)(13). If §206(d)(1) ERISA were "applicable nonbankruptcy law" under §541(c)(2), then the debtor's rights under the plan would not be property of the estate. If this were the case, there would be nothing to "exempt" under §522(d)(10)(E), making that statute superfluous as to such pension funds. No other reading of §522(d)(10)(E) makes sense.

Two interpretations of §522(d)(10)(E) have been advanced which purport to give it content even if ERISA pension rights are excluded from "property of the estate" under §541(c)(2). Upon examination, both fail. First, some courts have found that §522(d)(10)(E) is a "catch-all," applying only to rights under those few plans, such as government, church, or nonqualified plans, which are not required by ERISA to have or do not otherwise contain an anti-alienation clause. The Report of the Commission On Bankruptcy Laws establishes clearly that this is not the case. It shows that a "reasonable necessity" standard was placed in §522(d)(10)(E) in order to limit exemption of "very substantial" benefits by "members of professional corporations" and "officers." Churches and governments are not professional corporations and their

employees are not members or officers of professional corporations. The substantial benefits which concerned Congress are certainly more likely to accrue in private sector plans, where salaries are higher, and in tax qualified plans, where earnings build up tax-free, rather than in nonqualified plans. To limit §522(d)(10)(E) to pension rights under church, government and nonqualified plans is to flatly disregard that section's primary purpose.

It also has been suggested that §522(d)(10)(E) could still have meaning, even if ERISA pension rights were excluded from the bankruptcy estate, because that provision would still govern distributions under the plan during the pendency of the bankruptcy. This argument also fails. Congress did not intend that §522(d)(10)(E) be limited to exempting only pension rights which are in pay or over which the debtor has a right to take present distribution. Case law establishes, consistent with pre-Code law, that the §522(d)(10)(E) exemption also encompasses present vested rights to benefits distributable only at a future date. Therefore, Congress could not have intended to exclude these rights to corpus from the bankruptcy estate, *ab initio*, under §541(c)(2). Finally, reference to the state law tenancy by the entireties exemption (where available) establishes that a mere change in form of the entireties property into cash will not necessarily result in the property being subjected to the claims of non-joint creditors. Rather, it will remain exempt in most cases. By analogy, property, once excluded under §541(c)(2), would remain excluded, even if it changed in form to cash proceeds – *i.e.*, to distributions from an excluded pension plan.

The term "applicable nonbankruptcy law" is ambiguous. As used in 11 U.S.C. §522(b)(2)(B), "applicable nonbankruptcy law" refers solely to state law (concerning property rights as tenancies by the entirety), which rebuts the Fourth Circuit's claim that this language always refers to both state and federal law, absent an express limitation to state law alone. Because "applicable nonbankruptcy law" is ambiguous, the legislative history of §541(c)(2) should be consulted, which clearly shows Congress' intent merely to

"carryover" the exclusion of state law spendthrift trusts that existed under prior law. Moreover, a blanket ERISA exclusion under §541(c)(2) would be a drastic change in pre-Code law. Because there is no evidence in the legislative history that Congress intended such a change, this court should hold that "applicable nonbankruptcy law" under §541(c)(2) is limited to rights under spendthrift trusts recognized by state law.

ERISA does not supersede, alter, or impair any federal laws of the United States other than pension laws. Accordingly, an ERISA anti-alienation clause falls to other federal laws. This principle has been recognized with respect to a federal tax lien statute, and it should be so recognized as to the Bankruptcy Code as well. Cases holding that ERISA controls over conflicting state law are inapposite.

It has been suggested that allowing creditors, through the trustee, to reach an individual debtor's ERISA pension plan rights would cause the entire plan to lose its tax-exempt status. Courts have uniformly rejected this argument. Seven reported decisions establish, without any precedent to the contrary, that including the pension rights within the bankruptcy estate and ordering turnover, where appropriate, will not disqualify the plan.

Nor is a tortured construction of §541(c)(2) necessary to permit a debtor to claim favorable state law homestead and tenancy by the entireties exemption rights, as ERISA does not pre-empt state exemption of pension rights. Rather, an election to take state exemptions of pension rights, where it is available, ensures the debtor's "fresh start," a principal goal of the Bankruptcy Code. ERISA does not pre-empt state law which accomplishes this federal goal.

Finding for the Petitioner will not conflict with ERISA's goal of uniform treatment of pensions. Uniform treatment of pension plans is available under §522(d)(10)(E), the applicable federal exemption. Moreover, if ERISA constitutes "other federal law" for purposes of 11 U.S.C. §522(b)(2)(A), an issue which Tatge suggests should be decided by the Fourth Circuit on remand, there would be a uniform exemption as well for

ERISA plan rights for debtors who choose "state" exemptions. Thus, there is no need to adopt a tortured construction of §541(c)(2) to achieve this policy result.

Finally, because the difficult issue of whether 206(d)(1) of ERISA is "Federal law other than subsection (d)" for purposes of §522(b)(2)(A) is not properly before the Court, this cause should be REVERSED and REMANDED.

ARGUMENT

I. THE TERM "APPLICABLE NONBANKRUPTCY LAW" FOR PURPOSES OF 11 U.S.C. §541(c)(2) IS LIMITED TO STATE SPENDTHRIFT TRUST LAW AND DOES NOT ENCOMPASS §206(d)(1) OF ERISA.

A. Section 522(d)(10)(E)(iii), as applicable to a debtor choosing "federal" exemptions under §522(b)(1), which conditions exemption for rights under a pension plan established by an "insider" (such as Mr. Shumate) on the plan being qualified under §401(a), 403(a) 403(b), 408 or 409 of the Internal Revenue Code, establishes that a debtor's rights under all such "tax qualified" plans cannot be excluded from "property of the estate" under §541(c)(2), which would render §522(d)(10)(E)(iii) superfluous.

1. The legislative history of Section 522(d)(10)(E) demonstrates that a debtor's rights under a §401(a) tax qualified plan subject to ERISA are intended to be covered by exemption under §522, rather than exclusion under §541(c)(2).

The unambiguous statutory language of Section 522(d)(10)(E)(iii) of the Bankruptcy Code (11 U.S.C. §101, *et seq.*) and in particular subparagraph (iii) thereof establishes, without question, that rights under a tax qualified pension plan cannot, solely by virtue of the plan containing an anti-alienation clause required by ERISA, be excluded from the bankruptcy estate under §541(c)(2) of the Bankruptcy Code.

By way of background, the broad sweep of the definition of "property" belonging to the bankruptcy estate under Section

541(a) of the Bankruptcy Code encompasses all legal or equitable interests of the debtor, wherever located or by whomever held, subject only to limited exclusions under 11 U.S.C. §541(b) and 11 U.S.C. §541(c)(2). Under the latter, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title," thereby excluding the associated property from the bankruptcy estate.

The Bankruptcy Code permits debtors, unless the State law applicable in the debtor's domicile limits exemptions to those available under state law,[1] to choose between claiming uniform "federal" property exemptions, pursuant to 11 U.S.C. §§522(b)(1) and (d), or (2) "state" exemptions, namely (A) both (i) property exempt under Federal law, other than 11 U.S.C. §522(d) and (ii) property exempt under state or local law applicable on the date of filing of the petition at the place the debtor's domicile has been located for the past 180 days, together with (B) any interest of the debtor as a tenant by the entirety or a joint tenant, to the extent that such interest is exempt from process under applicable nonbankruptcy law.

Section 522(d)(10)(E)(iii) of the Bankruptcy Code conditions exemption of a debtor's right to receive payments under a plan established by or under the auspices of an "insider" on the plan being "tax qualified" under §401(a),[2] 403(a), 403(b), 408 or 409 of the Internal Revenue Code (26 U.S.C. 001, *et. seq.*). It is obvious that, in order for this statutory language to be given effect, rights under tax qualified plans must be included in property of the estate under §541(a), and *not* subject to exclusion under §541(c)(2).

Here, Coleman Furniture Company ("CFC") is an "insider" of Respondent Shumate under 11 U.S.C. §101(31)(A)(iv)), and the CFC Pension Plan is a tax qualified pension plan under

1. Jurisdictions which have not opted out and permit debtors to elect either "federal" exemptions under §522(d) or applicable State exemptions include the District of Columbia.

2. Generally a corporate pension or profit sharing plan, or an H.R. 10 or "KEOGH" plan applicable to partners and sole proprietors.

§401(a) of the Internal Revenue Code. However, §522(d)(10)(E) is not the governing exemption provision in the instant case because Respondent Shumate lives in Virginia, which like certain other states has "opted-out" of the choice of "federal" exemptions provided under §§522(b)(1) and (d) of the Bankruptcy Code.[3] This is not of any consequence, as there are other debtors who are similarly situated to Mr. Shumate, but live in non opt-out states and choose federal exemptions. If, as to these debtors, §206(d)(1) of ERISA were "applicable nonbankruptcy law" for purposes of §541(c)(2), then §522(d)(10)(E)(iii) could not operate as intended. All rights to payments under the plan in question would already have been excluded from the estate under §541(c)(2), making §522(d)(10)(E) superfluous. This Court has previously stated its "[d]eep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag v. Commr.*, ___ U.S. ___, 111 S.Ct. 2631, 2638 (1991). It would be a grave injustice to hold that the ambiguous term "applicable nonbankruptcy law" under §541(c)(2) encompasses §206(d)(1) of ERISA and excludes rights under a §401(a) tax qualified pension plan, when the effect is to override the unambiguous statutory language of §522(d)(10)(E)(iii), which on its face establishes that this cannot have been Congress' intent.

2. Congress did not enact §522(d)(10)(E) as a "catchall" provision applicable only to rights to payments under government, church and nonqualified plans (with all other ERISA pension rights to be excluded from the bankruptcy estate under §541(c)(2)).

Certain courts have attempted to harmonize an ERISA exclusion under §541(c)(2) with the language of §522(d)(10)(E) by determining that §522(d)(10)(E) is a "catchall." After excluding rights under all tax qualified plans required by ERISA to have an anti-alienation clause under §541(c)(2), these courts attempt to give content to §522(d)(10)(E)(iii) by supposing that Congress intended it to be applicable to rights

3. Virginia Code §34-31.

under (i) a tax qualified pension or profit sharing plan not required by ERISA to contain an anti-alienation clause, such as a church or government plan, or (ii) a nonqualified or disqualified plan if either the plan was not established by an insider to the debtor, or the payment was not on account of age or service. *See, e.g., In re Cheaver, supra.* This rationale fails completely.

Thus, under §4-503 ("Exemptions") in the Report of the Commission on the Bankruptcy Laws of the United States (hereinafter the "Commission Report"), the text of §4-503(c)(6) which ultimately emerged, after minor change, as §522(d)(10)(E) as enacted states that the following property shall be exempt:

> (6) before or after retirement, such rights as the debtor may have under a profit sharing, pension, stock bonus, annuity, or similar plan which is established for the primary purpose of providing benefits under retirement by reason of age, health or length of service, and which is either (a) qualified under section 401(a) of the Internal Revenue Code, or any successor thereto, or (b) established by federal or state statute, to the extent in either case the debtor's interest therein is reasonably necessary for the support of the debtor and his dependents.

Report Of Commission On The Bankruptcy Laws of the United States §4-503(c)(6), H.R. Doc. 93-317, 93rd Cong., 1st Sess. Part II at 125 (1973), *reprinted* in 2 App. L. King, K. Klee & R. Levin, *Collier on Bankruptcy* 125 (15th ed. 1991). Further, Note 8 to §4-503 of the Commission Report clarifies

> The value of property exempted by clauses (4), (5), (7), (8) and (9) of subsection (c) is not limited. *Benefits or rights under a retirement plan are exempt under clause (6) if the plan is qualified under I.R.C. §401(a). A limit is placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits.* The exemption is limited to benefits 'reasonably necessary for the support of the debtor and his dependents.' This treatment is similar to that accorded interests in spendthrift trusts by §4-601(b) of the proposed Act. For a discussion of the options of the trustee as to reaching excess benefits, see the Note to §4-601.[4]

Id. at 129 (emphasis added).

Churches and governments do not employ "members of professional corporations," because churches and governments are not professional corporations. Nor do they generally have "corporate officers." In a similar vein, what church or government is likely to have a "stock bonus" plan? Moreover, non-insiders are less likely to be corporate officers, or accrue in nonqualified plans the "substantial benefits" with which the drafters of what ultimately became §522(d)(10)(E) were concerned. Significant plan balances are most likely to occur in plans which *are* tax qualified where earnings on the trust corpus build-up tax free, rather than vice-versa. These facts all support a congressional intent to exempt rights under all qualified pension plans in §522(d)(10)(E), not merely church and government plans, or nonqualified pension plans.

As written by the Commission, §4-503 exempted a debtor's rights to payments under all tax-qualified plans, subject to the "reasonable support" limitation. Congress, with no explanation whatsoever, ultimately placed one more limitation in the final text of §522(d)(10)(E) and precluded any exemption whatsoever for rights to payment where all the requirements of subsections (i) — (iii) are met; *i.e.* (i) the plan is *not* a qualified plan, or has been disqualified; (ii) the plan was established by an "insider," and (iii) the payment is on account of age or length of service. This does not detract in anyway

4. Note 10 to §4-601, at page 151 of Part II of the Commission Report, referring to the precursor of §541(c)(2), states "Subdivision (b) creates an exception as to spendthrift and support trusts. The beneficial interest of the debtor in income and principal needed to support the debtor and his dependents is not available to creditors. If the income exceeds such amount, the trustee can sell the right to the excess income, hold open the case so as to collect the income, or reach the principal to the extent in excess of the principal needed to generate the support income. The last option is subject, of course, to the rights of any third person in the principal."

from the preceding analysis which establishes that Congress intended rights under tax qualified plans—including both those required by ERISA to contain anti-alienation clauses and those not required to do so, such as church or government plans—to be exempted under §522(d)(10)(E).

Congress was well aware of ERISA when drafting pension exemptions under the new Bankruptcy Code, and the drafters intended that the Bankruptcy Code prevail over ERISA and permit a trustee to reach plan benefits in excess of those "reasonably necessary" for support of the debtor or dependents of the debtor. Commission Report Part I, Note 8 to §4-503, *supra*. Moreover, testimony given in 1975 by John J. Creedon, chairman of a committee of the American Life Insurance Association and Senior Vice President and General Counsel of Metropolitan Life Insurance Company of New York shows the following dialogue:

> Senator Burdick: What provision would you recommend to reconcile the provisions of the Employees [sic] Retirement Income Security Act with section 4-503(c)(6) of the Commission's bill and 4-503(e)(5) of the judge's bill [the exemption provision]?
>
> Mr. Creedon: This I guess had to do with the fact that a pension benefit is not assignable and the Commission's bill would allow an exemption only with respect to that portion of the pension plan that is necessary for the bankrupt's maintenance. *I guess something could be put in the Bankruptcy Act to the effect that notwithstanding the provision in ERISA or otherwise the trustee would be able to get to the excess.*

Hearings on S. 235 and 236 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 664, 678 (1975) (statement of John Creedon, American Life Insurance Association) (Government Printing Office 1975) (emphasis added).

Although Congress did not follow Mr. Creedon's advice and explicitly say that ERISA plan rights are included among the "federal" bankruptcy exemptions (to the extent reasonably

necessary for the support of the debtor), Congress did what should be deemed enough. It enacted language—*with the ERISA issue squarely before it*—that exempts "[t]he debtor's right to receive . . . a payment under a stock bonus, pension, profit sharing or similar plan . . . to the extent reasonably necessary for the debtor and any dependent of the debtor" and, moreover, denies any exemption whatsoever to rights to benefits when the requirements of §522(d)(10)(E)(i)-(iii) are all met. The plain meaning of this statutory language requires a finding that rights under all qualified plans under §401(a) of the Internal Revenue Code, together with the other enumerated I.R.C. Code sections, come into the bankruptcy estate, from which they may be exempted out. As this Court has observed:

> [T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity of an acute and powerful intellect would discover.

Lynch v. Alford-Stephens Co., 267 U.S. 364, 370 (1925).

The argument that §522(d)(10)(E) is a "catchall" has been shown to be the product of the active imagination and creative thinking of debtors' counsel, ascribing to Congress and the members of the Commission On Bankruptcy Laws far more sophistication, and a much more limited intention than clearly had existed.

3. Congress did not intend that §522(d)(10)(E) be limited to exempting only pension rights which are in pay, or over which the debtor has a present right to take distribution. Pre-Code law and post-Code case law consistently hold that the §522(d)(10)(E) exemption encompasses rights to future distributions from undistributed corpus as well. Therefore, Congress could not have intended to exclude these rights to corpus from the bankruptcy estate, *ab initio*, under §541(c)(2).

Some courts suggest, contrary to the language of both §522(d)(10)(E) and §541(c)(2), and without support of any kind from the legislative history, that if §206(d)(1) of ERISA is applicable nonbankruptcy law for purposes of §541(c)(2) and pension assets in the hands of the plan trustee are thereby beyond the reach of the bankruptcy trustee, subsequent distributions from the plan during the pendency of the bankruptcy would nonetheless be subject to exemption under §522(d)(10)(E), thereby not making the latter statute superfluous. *See Velis v. Kardanis*, 949 F.2d 78, 81 (3rd Cir. 1991) and *Gladwell v. Harline (In re Harline)*, 950 F.2d 669, 675 (10th Cir. 1991). This fails, for several reasons.

First, the language of §522(d)(10)(E) exempts a debtor's "right" to payments "under" a plan. This evidences that Congress intended to exempt not only rights presently in pay status, and rights to corpus to the extent that the debtor has a right to take present distribution thereof, but also rights to future distributions from the corpus which cannot be received until a later date, to the extent that the debtor is presently vested in such rights. If Congress had intended to exempt "distributions" or "payments" it would not have used the term "rights" and "under." These terms clearly indicate that the terms of the plan document govern the scope of the exemption and the bankruptcy trustee's "right" to the debtor's benefits (where not subject to exclusion as a state law spendthrift trust). A pension plan typically gives a debtor "rights" to receive future payments commencing at normal retirement age well *before* that time, upon satisfaction of annual plan service requirements. This concept is called vesting, under which an employee who has been employed a requisite number of years (presently 5 years)[5] vests in his or her accrued benefits, and then in future benefit accruals every plan year thereafter in which the debtor works the requisite number of hours for benefit eligibility. These benefits are then non-forfeitable, even though they may not be distributed until normal retirement, or in some cases early retirement at age 55. Moreover, both the subject of the statute (stock bonuses, pensions, profit sharing and annuities) and the purpose of the statute (exemptions for reasonable necessities) support the interpretation that a right to future, not merely presently distributable plan benefits is contemplated, as these benefits are all usually presently vested "rights" to benefits to be received in the future.

5. 26 U.S.C. §411(a)(2); 29 U.S.C. §1053.

Several courts having found this logic compelling, concluded that §522(d)(10)(E) deals with a debtor's right to future, as well as present distributions, and granted exemption even though the debtor is not presently in pay status. *See, e.g., In re Cilek*, 115 Bankr. 974 (Bankr. W.D. Wis. 1990) and *In re Miller*, 33 Bankr. 549 (Bankr. D. Minn. 1983). A number of bankruptcy courts have construed state exemption statutes analogous to §522(d)(10)(E) in a similar manner, and permitted a debtor not in pay status to exempt rights to plan benefits distributable in the future. These decisions include, without limitation, *Matter of Weaver*, 98 Bankr. 497 (Bankr. D. Neb. 1988); *In re Schlee*, 60 Bankr. 524 (Bankr. D. Minn. 1986); and *In re Petit*, 57 Bankr. 362 (S.D. Iowa 1985).

Those holdings which allow a debtor not in pay status to exempt presently vested rights to future payments, treating the plan as a substitute for future wages, are faithful to the legislative history of the Bankruptcy Code and consistent with pre-Act law. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. (1977), as reprinted in 2 App. L.King, K. Klee & R. Levin, *Collier on Bankruptcy* 362 (15th ed. 1991) (hereinafter "H.R. No. 95-595") states: "Paragraph 10 exempts certain benefits that are akin to future earnings of the debtor." H.R. Rep. 95-595 at 362. As to pre-Act law, see *Matter of Turpin*, 644 F.2d 472, 475 (5th Cir. 1981):

> [i]t appears that in *Nunnally* as here the bankrupt was not even entitled to receive any of these benefits until some time in the future. In *Nunnally* [506 F.2d 1024] we concluded that awarding the bankrupt's retirement benefits to the trustee would deprive the bankrupt of a genuine fresh start . . . .Providing the bankrupt with a 'fresh start' means assuring him that assets to which he may become entitled *in the future* will be acquired free of

> any pre-bankruptcy obligations. Future wages may not be garnished to pay those obligations and pension benefits received in the future, even though they may be the product of pre-bankruptcy contributions to a pension fund, are a substitute for future wages and thus pass to the bankrupt free of the claims of prebankruptcy creditors (emphasis in the original).

The only significant change is that the Bankruptcy Code now imposes a "reasonable necessity" limitation on the exemption. This Court recently stated that it "[h]as been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *Dewsnup v. Timm*, 112 S.Ct. 773,779 (1992). Here, it is clear that pre-Code law permitted exemption of rights to both future and present payments. Because there is no support whatsoever in the legislative history supporting the position that §522(d)(10)(E) changed pre-Code law so as to apply only to, and exempt rights to present payment, this position should be rejected.

The upshot of the foregoing is, that if Congress intended vested rights in plan corpus to be exempt under §522(d)(10)(E) to the extent needed to produce a *future* income stream reasonably necessary for the debtor's support, if any, ***then it could not have intended that the same corpus be excluded from the estate under §541(c)(2).*** Thus, those who would exclude ERISA pensions from property of the estate cannot convincingly argue that the trustee's right to obtain only rights which are in, or can be the subject of present distributions from the trust, gives meaning to §522(d)(10)(E).

If pension assets attributable to a debtor's plan interest are excluded from "property of the estate" by virtue of §541(c)(2), they cannot later come into the estate when they are later "distributed." Once property is excluded from the estate it remains so, permanently. Two situations illustrate this. First, consider the analogous circumstance of a debtor who claims "state" exemptions, and holds property with his or her non-

debtor spouse in tenants by the entirety. In many cases, "applicable nonbankruptcy" local law will effectively exempt this property from the bankruptcy estate under §522(b)(2)(B), because property held in tenancy by the entireties cannot be reached under local law, except by joint creditors. Cash proceeds of entireties property, whether held in cash at the petition date or converted into cash by a post-petition sale of the entireties property are similarly exempt, at least where the proceeds are intended to be reinvested in other entireties property, or where the state recognizes a tenancy by the entireties in cash as a form of personal property. *See Muskegon Lumber & Fuel Company v. Johnson*, 338 Mich. 655, 62 N.W. 2d 619 (1954) (proceeds from sale of entireties property exempt from process in Michigan where it was clear that the intent of the husband and wife was to immediately invest their funds to acquire other entireties property); *Accord Matter of Jones*, 31 Bankr. 372, 375 n. 4 (Bankr. E.D. Mich. 1983); and *Pitts v. United States*, 408 S.E. 2d 901 (Va. 1991) (notes received in exchange for property held by entireties are also held by the entireties, even where the notes themselves do not contain language indicating a right of survivorship). By analogy, that a debtor's interest excluded under §541(c)(2) is later converted into cash does not necessarily bring it into the estate.

Also, consider a troubled employer with an over-funded defined benefit pension plan, as here. The employer terminates the plan, purchases from a well capitalized insurance company annuities covering all individual future employee benefits remaining to be paid under terms of the plan, and after paying the IRS an excise tax recovers the plan surplus in reversion. Employees, who may be in bankruptcy, will receive, currently, a distribution "in-kind" in the form of insurance company annuity certificate(s) in his or her personal name, which promise to pay benefits due by the plan, as fixed as of the plan termination date.[6] If the Third and Tenth Circuit's positions were correct, then the debtor's interest in such plan would come into the bankruptcy estate, subject to

6. *See* Taige, "Preparing for Asset Reversions on Termination of Defined-Benefit Plans," 63 *J. of Tax'n* 20 (July, 1985).

exemption under §522(d)(10)(E). However, a debtor in these circumstances would fare poorly, at least in comparison to a similarly situated debtor employed by a healthy company which did not terminate its corporate plan during the pendency of the individual employee's bankruptcy, where under these courts rationale the plan benefits would remain outside the estate under §541(c)(2). In the former case, through no fault or action of the debtor, pension benefits not payable currently in cash would be exposed to the Chapter 7 trustee. In the latter case (the debtor employed by the solvent company), if ERISA were indeed "applicable nonbankruptcy law" for purposes of §541(c)(2) the plan benefits would not be so exposed. Surely Congress could not have intended such a dichotomy in treatment.

B. The legislative history of §541(c)(1) of the Bankruptcy Code indicates that the term "applicable nonbankruptcy law" as used therein refers to "local rules of transferability". This strongly suggests that the term as used in §541(c)(2) refers to state law as well.

The term "applicable nonbankruptcy law" as used in §541(c)(1) refers to state law. See Commission Report, *supra*, Part I at 193 where, with respect to general recommendations concerning "property of the estate" it states "Consistent with the recommendations that the property subject to administration not be determined by local rules of transferability, the Commission recommends that any prohibition on the transfer of property by the debtor and any provision for forfeiture or termination as a result of the filing of a petition be unenforceable as to property of the estate, except as qualified in the case of spendthrift trusts." The normal rule of statutory construction, usually applicable to use of identical words in the same section of the same enactment, is that they are intended to have the same meaning. *Dewsnup v. Timm*, 112 S.Ct. at 780-781 (Scalia and Souter, JJ, dissenting).

C. The term "applicable nonbankruptcy law" is ambiguous. As used in §522(b)(2)(B) (and §541(c)(1)), it refers solely to state law, absent any express limitation to state law alone. It is also rendered ambiguous by inconsistent statutory language in §522(d)(10)(E). Accordingly, the legislative history of §541(c)(2) must be consulted, which establishes that the exclusion in §541(c)(2) is limited to state spendthrift trust law.

1. The term "applicable nonbankruptcy law" is ambiguous, because in the context of §522(b)(2)(B) (dealing with tenancy by the entirety), and §541(c)(1) as well, the term "applicable nonbankruptcy law" means *only* state law, absent any explicit limitation to state law alone.

The term "applicable nonbankruptcy law" as found in §541(c)(2) is ambiguous. What is and is not relevant, suitable or fit law to be applied cannot be determined from the face of §541(c)(2). The term "applicable nonbankruptcy law" is a ubiquitous phrase used over 15 times in the Bankruptcy Code; each use of the term "nonbankruptcy law" is necessarily statute specific due to the use of the qualifying adjective "applicable." That the identical words "applicable nonbankruptcy law" are used in different parts of the Bankruptcy Code does not necessarily mean that they have the same meaning in each place.

Because what the term "applicable nonbankruptcy law" does and does not mean within the context of a particular statute is not readily apparent on its face, the term is ambiguous. *See Tabor v. Employee Benefits Committee*, 121 Bankr. 1006,1011 (Bankr. S.D. Ind. 1990) *aff'd* 127 Bankr. 194 (S.D. Ind. 1991), rejecting specifically the contrary decision in *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990). The fact that there is a 5-4 split of opinion among the Circuit Courts of Appeal which have considered the issue of whether §206(d)(1) of ERISA represents "applicable nonbankruptcy law" for purposes of §541(c)(2), and the relationship between the construction of §541(c)(2) advanced

by the Respondent and the language of §522(d)(10)(E) also serve to establish that the term "applicable nonbankruptcy law" is ambiguous. The "majority rule," followed in the Ninth, Eleventh, Eighth, Fifth and Second Circuits, is that the phrase "applicable nonbankruptcy law" in §541(c)(2) only applies to state spendthrift trust law. *See Daniel v. Security Pacific Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); *Goff v. Taylor (In re Goff)*, 706 F.2d 574 (5th Cir. 1983); *Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982); *see also Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435 (5th Cir. 1991) (affirming position taken in *Goff* and declining to follow *In re Moore*); *Reed v. Drummond (In re Reed)*, 951 F.2d 1046 (9th Cir., 1991) (affirming position previously taken in *In re Daniel* and declining to follow *In re Moore*); *Pitrat v. Garlikov*, 947 F.2d 419 (9th Cir. 1991) (same). *See also In re Perkins*, 902 F.2d 1254, 1256 n.1 (7th Cir. 1990) (noting in *dicta* that "[t]he legislative history of §541(c)(2) indicates that Congress enacted the provision in order to exempt spendthrift trusts from the debtor's estate").

By contrast, the minority position advocated by Respondent and adopted by the Fourth, Sixth, Third and Tenth Circuits is that §206(d)(1) of ERISA is "applicable nonbankruptcy law" for purposes of §541(c)(2). *See In re Moore, supra*, *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2275 (1991); *Velis v. Kardanis, supra*; *In re Harline, supra*.

In rejecting a narrow interpretation of §541(c)(2), the Fourth Circuit in *In re Moore* held that such an interpretation

> [c]annot be squared with the section's broad language. 'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase 'applicable nonbankruptcy law' or in the remainder of §541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

907 F.2d 1476, 1477.

This analysis of the minority position is flawed for there are two situations where the term "applicable nonbankruptcy law" appears in the Bankruptcy Code and refers solely to state law. Section 522(b)(2)(B) permits a debtor who chooses "state" exemptions to exempt tenancy by the entireties and joint tenancy property in states in which assets so held are not subject to execution under local law by non-joint creditors. In this context, the term "applicable nonbankruptcy law" must mean state law, because property rights are determined solely by state law. *See, e.g., In re Bialon*, 67 Bankr. 451, 453 (Bankr. W.D. Pa. 1986) ("A debtor may claim as exempt from the bankruptcy estate entireties property pursuant to §522(b)(2)(B), if that property is immune from process under applicable nonbankruptcy law. The question we must decide is whether the Debtor's entireties property in this instance is immune from process under Pennsylvania law.") *See also White v. White (In re White)*, 851 F.2d 170, 173 (6th Cir. 1988) ("The Bankruptcy Code does not define a debtor's interest in property; the answer to that question must be made after reference to state law"). *See also* §541(c)(1) as discussed *supra*.

Accordingly, Respondent's assertion, based on the holdings of *Moore* and *Lucas* that the phrase *always* (and thus clearly and unambiguously) refers to *both* state and federal law whenever it is used in the Bankruptcy Code, is simply incorrect.

2. The Legislative History of §541(c)(2) should be consulted because the term "applicable nonbankruptcy law," as used in the Bankruptcy Code, is ambiguous.

The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241-242, 109 S.Ct. 1026, 1030-1031, 103 L.Ed 2d 290 (1989). Similarly, when the Court finds the terms of a

statute unambiguous judicial inquiry is complete, except in rare and exceptional circumstances. *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed. 2d 633 (1981). Obviously, the "plain meaning" rule can, however, have no applicability unless the plain meaning is conclusive. This cannot be the case where a particular term is "ambiguous."

Where the resolution of a question of federal law turns on a statute and the intention of Congress, it is appropriate to look to the statutory language, and then to the legislative history if the statute is unclear. *Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197, 2200 (1991). In so doing, a statute is to be read as a whole, since the meaning of the statutory language, plain or not, depends on context. *King v. St. Vincent's Hosp.*, ___ U.S. ___, 112 S. Ct. 570, 574 (1991).

Thus, in the instant case, where §541(c)(2) is unclear because the term "applicable nonbankruptcy law" is ambiguous, it is appropriate to consider the legislative history of §541(c)(2) in divining Congressional intent.

3. The legislative history of §541(c)(2) establishes that it was intended merely to carryover prior law which excludes from property of the estate the debtor's interest in a spendthrift trust protected under applicable state law.

The legislative history of §541(c)(2) suggests a very limited intention. H.R. Rep. No. 95-595, *supra* states at 369 that:

> Subsection (c) [of Section 541] invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate . . . Paragraph (2) of subsection (c), however, *preserves* restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law (emphasis added).

Moreover, in its overview of the new legislation the House Report states:

> The bill also *continues over* the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable *State* law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.

Id. at 176 (emphasis added).

4. Because a blanket exclusion for all ERISA plans under §541(c)(2) would be a significant change in pre-Code practice, because the statute is ambiguous, and because there is no discussion of such a change in the legislative history, this court should reject Respondent's position that §206(d)(1) of ERISA is "applicable bankruptcy law" for purposes of §541(c)(2).

In *Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773,779 (1991) this Court held that:

> When Congress amends the bankruptcy laws, it does not write on a 'clean slate.' *See Emil v. Hanley*, 318 U.S. 515, 523, 63 S. Ct. 690-691, 87 L.Ed. 954 (1943). Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. [citations omitted]. Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy . . . without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Here, finding that there is a blanket exclusion from property of the estate for rights under pension and related plans which contain an ERISA mandated anti-alienation clause—*i.e.*, that §206(d)(1) of ERISA represents "applicable nonbankruptcy

law" for purposes of §541(c)(2) — would be a major change in pre-Code law. Not only is there no suggestion whatsoever in the legislative history of any intention to make such a change, there is a clear suggestion to the contrary — that all that is intended is to "carryover" pre-Code law with respect to the exclusion of state law spendthrift trusts. Under these facts, and because the statute as written is ambiguous, this Court should reject Respondent's argument.

D. ERISA's anti-alienation provisions do not preempt the Bankruptcy Code.

1. ERISA does not supersede, alter, amend or impair the Bankruptcy Code or any other law of the United States, other than federal pension benefit laws. Thus, just as the federal tax lien statute overrides an ERISA anti-alienation clause, so should the Bankruptcy Code.

Section 514(d) of ERISA provides that "[n]othing in this [Act] shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States [except preexisting federal pension and retirement benefit law] or any rule or regulation issued under such law." 29 U.S.C. §1144(d). From this statutory language is it clear that ERISA was not intended to override Federal bankruptcy law. The broad sweep of the definition of "property" belonging to the bankruptcy estate found in 11 U.S.C. §541(a)(1) surely encompasses a debtor's interest in retirement plans as a general rule, whether ERISA and/or tax-qualified or not.

Unless §206(d)(1) of ERISA itself qualifies as "*applicable* nonbankruptcy law" for purposes of §541(c)(2), a debtor's interest in an ERISA plan will come into the bankruptcy estate. Courts have so recognized, stating "ERISA was not intended to affect the operation of other federal laws including federal bankruptcy laws. If a distinction is created by operation of bankruptcy law which might conflict with ERISA, bankruptcy law prevails." *In re Goff, supra*, 706 F.2d at 589; *Accord Levine v. Central States, Southeast & Southwest Areas Pension Fund (In re Ottawa Cartage, Inc.)*, 55 Bankr. 371, 377-78 (N.D. Ill. 1985).

Thus, Federal tax liens have been held to override an ERISA anti-alienation clause under 26 U.S.C. §6321, and under §522(c)(2)(B) a claim of federal pension exemption under §522(d)(10(E) as well. *See In re Perkins*, 134 Bankr. 408 (Bankr. E.D. Cal. 1991). There, Perkins was 52 years old and held a vested right to a defined pension benefit under a union plan. He was, however, not entitled to receive payments until age 62, at which time monthly payments of $574/month would commence and continue until death. Perkins argued that the fact his rights to the pension were restricted from transfer by the plan's ERISA required spendthrift clause established that his pension rights were not property of the estate and, if they were property of the estate, they had no value, as the pension was not yet in pay status. The court properly rejected both arguments.

Just as the Internal Revenue Code, a federal statute, overrides an ERISA anti-alienation clause, so too should the Bankruptcy Code. 29 U.S.C. §1144(d).

2. Cases which hold that ERISA controls over conflicting state law are inapposite.

In contrast to federal law, ERISA will override state law. 29 U.S.C. §1144(a).[7] "But, [w]hile ERISA-required anti-alienation clauses may preempt state law and preclude the use of judgment enforcement devices thereunder, they do not preclude inclusion of pension benefits in a debtor's bankruptcy estate by operation of federal law." *In re Graham, supra*, at 1273.

The decision in *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 110 S.Ct. 680 (1990), cited by Respondent (Brief in Opposition at 21-22) in no way alters this

7. "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter related to any employee benefit plan described in section 4(a) [29 U.S.C. §1003(a)] and not exempt under section 4(b) [29 U.S.C. §1003(b)]. This section shall take effect on January 1, 1975."

conclusion, or suggests that ERISA's anti-alienation provisions override otherwise applicable federal bankruptcy statutes. There, Guidry, a former union official, pled guilty to embezzlement of funds from the union. Two of the union plans forfeited his benefits, and he filed suit. The union intervened and stipulated with Guidry as to a money judgment in its favor. This Court overturned a constructive trust imposed on Guidry's pension benefits, and declined to find that "other appropriate relief" available to the labor unions under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §501(b), would override the anti-alienation provisions of ERISA, a more specific statute.

In the instant case *Guidry* is distinguishable. Mr. Guidry was not in bankruptcy, and the decision makes no reference of any kind to the Bankruptcy Code. Here, the issue in the case at bar is not whether or not to impose an equitable exception to ERISA, but how to resolve a conflict between two federal statutes, ERISA and the Bankruptcy Code. In the bankruptcy context:

> [t]wo specific statutory provisions are in conflict. It is *not* simply the *general* purposes behind the Bankruptcy Code that have led courts to conclude that ERISA qualified pension plans are included in the debtor's estate, but *specific* statutory mandates. Therefore, the court will not rely on *Guidry*, which is clearly distinguishable...

Tabor v. Employee Benefits Committee, 121 Bankr. 1006, 1011 (Bankr. S.D. Ind. 1990), *aff'd* 127 Bankr. 194 (S.D. Ind. 1991). *See also In re Martin*, 119 Bankr. 297 (Bankr. M.D. Fla. 1990).

E. Finding For The Petitioner Will Not Disqualify The CFC Plan.

Respondent raises a "red herring" when he points to risk of an alleged tax disqualification if his position is not supported. Brief In Opposition, footnote 3 page 12. It is true that in several private Letter Rulings the IRS has threatened to disqualify a pension plan if it complied with a Bankruptcy Court order directing payment to the estate of the debtor's

pension rights. *See* PLR 9011037, PLR 8910035 and PLR 8130120. However, to the best of counsel's knowledge the IRS has *never* actually disqualified a plan on this basis, and none of the foregoing private letter rulings may properly be cited as precedent. 26 U.S.C. §6110(j)(3).

More importantly, a wealth of decisions which can be relied upon as precedent hold that compliance with a bankruptcy court order directing turnover, where appropriate, of pension assets will not disqualify the plan, and there are no reported decisions to the contrary. *See Regan v. Ross*, 691 F.2d 81,87 (2d. Cir. 1982); *In re Threet*, 118 Bankr 805, 808-809 (Bankr. N.D. Okl. 1990); *In re Pulley*, 111 Bankr. 715, 742-746 (Bankr. N.D. Ind. 1989); *In re Gallagher*, 101 Bankr. 594 (Bankr. W.D. Mo. 1989); *In re Babo*, 81 Bankr. 389 (Bankr. W.D. Pa. 1988), *reconsideration denied* 97 Bankr. 827, 830 (Bankr. W.D. Pa. 1988); *In re DeWeese*, 47 Bankr. 251, 256 (Bankr. W.D. N.C. 1985); and *In re Di Piazza*, 29 Bankr. 916, 922-923 (Bankr. N.D. Ill. 1983). Most decisions have found an "implied amendment" of §206(d) of ERISA upon enactment of the Bankruptcy Code, "notwithstanding the strong judicial policy disfavoring the inference that a statute has been repealed sub silentio by subsequent legislation." *See, e.g., Regan v. Ross, supra* at 87. Based on the foregoing, the threat of plan disqualification is a "straw man" argument, the product of the fertile imagination of pension and debtors' lawyers. The IRS has informally expressed a position; it has been rejected by the courts. But *c.f. In re Moore*, 907 F.2d at 1480-1481 (neither citing or otherwise distinguishing any of the preceding authorities).

F. It is not necessary to exclude ERISA pension plans from "property of the estate" to give debtors a "fresh start." Debtors are free to elect state exemptions, including homestead, tenancy by the entireties and pension exemptions, because ERISA does not override state exemption statutes.

It is possible that behind tortured constructions of §541(c)(2) which construe §206(d)(1) of ERISA as "applicable nonbankruptcy law" there lies an unstated concern that

debtors will lose their rights to claim favorable state law homestead exemptions (and in some states such as the District of Columbia which prohibit levy except as to joint creditors, exemptions for assets held in tenancy by the entireties as well) by being forced to claim "federal" exemptions in order to exempt rights under ERISA qualified plans. This fear is grounded in the belief that no state law pension exemption can be valid due to ERISA's preemption. Supposedly, the debtor faces the Hobson's choice of choosing federal exemptions to protect his or her pension rights under §522(d)(10)(E), at a cost of loss of favorable state exemptions, or vice versa. This result is avoided if §206(d)(1) of ERISA can somehow be construed to be "applicable nonbankruptcy law" for purposes of §541(c)(2), as the related pension benefits are then excluded from the estate *ab initio*. To the extent this concern exists, it is displaced by *In re Dyke, supra* and *In the Matter of Volpe*, 943 F.2d 1451 (5th Cir. 1991). These decisions hold that ERISA does not pre-empt state law exemptions for ERISA qualified plans. The state exemption supports a principal goal of the Bankruptcy Code, the debtor's "fresh start", and is thus protected, as ERISA does not override the Bankruptcy Code.

G. Finding for the Petitioner does not do violence to ERISA's goal of uniform treatment of pensions, which is available under §522(d)(10)(E).

It is argued that the position advanced by the Petitioner would somehow "frustrate" the purposes of ERISA because the treatment of a debtor's interests in pension funds would vary from state to state. In the first place, this begs the question. The legislative history shows Congress had no intention to protect pension funds under § 541(c)(2) (except incidentally to the extent such funds are also protected by state spendthrift trust law). Moreover, if Congress desired a uniform treatment of a debtor's interest in ERISA pension plans in bankruptcy it could have prohibited the States from opting out. Despite initial recommendations from the Commission On Bankruptcy Laws to the contrary it chose not to do so, and continued to permit the choice of state law exemption rights in recognition of the varying circumstances

in different parts of the country, and the States interest in regulating credit. Congress' choice to permit diversity as to exemptions (for example, some states have unlimited homestead exemptions and others do not) should not be held against the Petitioner here. Further, some degree of uniformity does exist, at least in those states which have not opted out of the "federal" exemptions, where §522(d)(10)(E) can be expected to be uniformly applied.

II. WHETHER ERISA IS "FEDERAL LAW, OTHER THAN SUBSECTION (d)" FOR PURPOSES OF SECTION 522(b)(2)(A) IS NOT PROPERLY BEFORE THIS COURT AND SHOULD BE DECIDED ON REMAND.

An issue not properly before this Court is whether ERISA represents "Federal law, other than subsection (d)" in the case of a debtor such as Mr. Shumate who uses "state" exemptions. Notwithstanding the Fourth Circuit's express reservation of opinion on this issue below *(Shumate v. Patterson*, 943 F.2d 362,365-366 (4th Cir. 1991)), both the Petitioner and the Respondent ask this Court to resolve this issue. *Petition For Writ of Certiorari* at i; *Brief In Opposition* at i.

Amicus Tatge does not believe that the Court should reach this difficult issue. Accordingly, Tatge supports neither party, and believes that this question should be resolved by the Fourth Circuit Court of Appeals on remand. If the Fourth Circuit finds that ERISA is "other federal law" for purposes of §522(b)(2)(A) the Respondent will prevail. In contrast, if on remand the Fourth Circuit determines that this is not the case and, further, that the CFC Plan is not a spendthrift trust under Virginia law, then the Petitioner will prevail.

CONCLUSION

For the reasons stated herein, and by the Petitioner, Amicus Tatge believes that the Petitioner's position on §541(c)(2) should prevail. Because an issue remains whether Shumate's residual interest in the CFC Plan represents "property that is exempt under Federal law, other than subsection (d) of this

section . . . ,'' within the meaning of 11 U.S.C. §522(b)(2)(A), the cause should be REVERSED and REMANDED.

This the 6th day of March, 1992.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the foregoing Motion For Leave To File Amicus Curiae Brief, And Amicus Curiae Brief of David B. Tatge, Trustee, Urging Reversal And Remand were mailed by first class mail, postage prepaid to counsel for the Petitioner, G. Stephen Agee, Esquire, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Box 20068, Roanoke, Virginia 24018, and to counsel for the Respondent, Robert A. Lefkowitz, Esquire, Maloney, Yeatts & Barr, P.C., 600 Ross Building, 801 East Main Street, Richmond, Virginia 23219-2906 this 6th day of March, 1992.

David B. Tatge

②

No. 91-913

In The

Supreme Court of the United States

October Term, 1991

JOHN R. PATTERSON,

Trustee, Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE WAL-MART STORES, INC. AND WACHOVIA BANK AND TRUST, N.A. IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF AMICI CURIAE WAL-MART STORES, INC. AND WACHOVIA BANK AND TRUST, N.A.

Pursuant to Rule 37.4 of the Rules of the Court Amici Curiae, Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") and Wachovia Bank and Trust, N.A. (hereinafter "Wachovia Bank"), move the Court for leave to file the attached amicus curiae brief, urging the Court to AFFIRM the United States Court of Appeals for the Fourth Circuit. Wal-Mart and Wachovia Bank received written consent from Respondent to file an amicus curiae brief but not from Petitioner, necessitating this motion.

Wal-Mart and Wachovia Bank are the appellants in Appeal No. 90-2957-WM, styled *William A. Wear, Trustee v.*

Wachovia Bank & Trust, N.A. and Wal-Mart Stores, Inc., now pending before the United States Court of Appeals for the Eighth Circuit (the "Wal-Mart Appeal"). In an order issued in the case of *Nelson v. Zenith Electronics Corporation*, Appeal No. 91-2585WM, a case presenting the same issues as the instant case and in the Wal-Mart Appeal, the Eighth Circuit ordered that that case be held in abeyance pending a decision by this Court in the instant case. Although a similar order has not been entered by the Eighth Circuit in the Wal-Mart Appeal, it is the understanding of counsel for Wal-Mart and Wachovia Bank that the Eighth Circuit will also hold the Wal-Mart Appeal in abeyance pending a decision by this Court.

The Wal-Mart Appeal was necessitated by a turnover complaint filed against Wal-Mart and Wachovia Bank by William A. Wear, bankruptcy trustee for debtors Howard C. Green and Verla B. Green, who had filed a petition for relief under 11 U.S.C. Chapter 7. Mr. Green was a participant in the Wal-Mart Stores, Inc. Profit Sharing Plan (the "Wal-Mart Plan"). The United States Bankruptcy Court for the Western District of Missouri, Southern Division, ordered a turnover of Mr. Green's accrued benefit in the Wal-Mart Plan to Mr. Wear. On appeal, the United States District Court for the Western District of Missouri affirmed, leading to the appeal by Wal-Mart and Wachovia Bank before the Eighth Circuit. Wal-Mart and Wachovia Bank have resisted a turnover of Mr. Green's accrued benefit to the bankruptcy trustee on several grounds, including the reason that a participant's accrued benefit in a qualified employee pension benefit plan is excluded from that participant's bankruptcy estate pursuant to 11 U.S.C. §541(c)(2), or, in the alternative, that a

participant's accrued benefit in such a plan is exempt from that participant's bankruptcy estate pursuant to 11 U.S.C. §522(b)(2)(A).

Wal-Mart and Wachovia Bank's brief therefore supports Respondent on the above exclusion and exemption issues. This brief, however, raises other issues not set out in the parties' briefs. These additional issues are as follows:

1. A decision by this Court would have an impact on all qualified pension plans in the United States, whether they be those of an individual with substantial or complete control over the plan or the plan sponsor, as in the instant case, or those sponsored by large publicly-held corporations where plan participants have no control over the plan or distribution or withdrawal of their accrued benefit from the plan, as in the Wal-Mart Appeal;

2. The distribution of a debtor's accrued benefit in a qualified plan by order of a bankruptcy court which is not otherwise distributable to the participant under the terms of the plan will result in disqualification of the plan under §401(a)(13)(A) of the Internal Revenue Code of 1986, as amended ("I.R.C.") (26 U.S.C. §401(a)(13)(A)); and

3. A bankruptcy trustee acquires no greater rights than the debtor and, therefore, if the debtor cannot force a distribution under a qualified plan, neither can his bankruptcy trustee, even if the participant's accrued benefit is part of the bankruptcy estate and is non-exempt.

Wal-Mart and Wachovia Bank believe that several of the above issues may be raised by the parties in their briefs, but Wal-Mart and Wachovia Bank do not believe they will be fully explored, especially from the perspective of the risks to plans sponsored by major corporations. Secondly, Movants believe that it is imperative that the Court be appraised that an adverse decision in the instant case will affect not only small pension plans sponsored by professional corporations and closely-held corporations but also plans sponsored by large publicly-held corporations.

WHEREFORE, having shown an interest in the instant case and raising arguments including the concerns of large qualified plan sponsors, tax disqualification of qualified plans, and the powers of the bankruptcy trustee, AMICI CURIAE Wal-Mart and Wachovia Bank pray that this motion be GRANTED.

Respectfully submitted,

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October Term, 1991

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICI CURIAE WAL-MART STORES, INC. AND WACHOVIA BANK AND TRUST, N.A. URGING THE COURT TO AFFIRM ON BEHALF OF RESPONDENT

STATEMENT OF INTEREST OF WAL-MART STORES, INC. AND WACHOVIA BANK & TRUST, N.A., AS AMICI CURIAE

This brief is submitted on behalf of Wal-Mart Stores, Inc., a Delaware corporation ("Wal-Mart"), and Wachovia Bank & Trust, N.A. ("Wachovia Bank"), in support of the Respondent, Joseph B. Shumate, Jr. Wal-Mart and Wachovia Bank are the appellants in Appeal No. 90-2957, *William A. Wear, Trustee v. Wachovia Bank & Trust, N.A., and Wal-Mart Stores, Inc.*, now pending before the United States Court of Appeals for the Eighth Circuit.

On July 27, 1989, debtors Howard C. Green and Verla B. Green filed a petition for relief under 11 U.S.C. Chapter 7. A dispute arose in the proceeding concerning the status of Mr. Green's accrued benefit in the Wal-Mart Stores, Inc., Profit Sharing Plan (the "Wal-Mart Plan" or "Plan"). The bankruptcy trustee filed a turnover complaint under 11 U.S.C. §543 against debtors, Wal-Mart, and Wachovia Bank, seeking to withdraw Mr. Green's account balance from the Plan, which was resisted by Wal-Mart and Wachovia Bank. After adverse determinations by the United States Bankruptcy Court for the Western District of Missouri, Southern Division, and the United States District Court for the Western District of Missouri, Wal-Mart and Wachovia Bank appealed to the Eighth Circuit.

Wal-Mart established the Plan and the Wal-Mart Stores, Inc., Profit Sharing Trust (the "Trust") as part of the Plan in 1971. The Plan is qualified under §401(a) of the Internal Revenue Code of 1986, as amended (the "I.R.C.") and is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Wachovia Bank is the currently acting trustee of the Trust.

Wal-Mart operates approximately 1,728 discount retail stores in 40 states, and approximately 212 additional stores in 37 states under the trade name "Sam's Wholesale Club". There are approximately 220,000 participants in the Wal-Mart Plan. As of January 31, 1991, Plan assets totaled $1.8 billion.

The Wal-Mart Plan is entirely funded by contributions from Wal-Mart. Annual contributions are made at the sole discretion of the Board of Directors of Wal-Mart. The Plan does not accept, nor require, any employee contributions.

At the time of the filing of the bankruptcy petition by Mr. and Mrs. Green, and throughout the Wal-Mart Appeal, Mr. Green was and is employed by Wal-Mart as a store manager. Mr. Green is not an officer or director of Wal-Mart or Wachovia Bank.

As required by I.R.C. §401(a)(13)(A) and 29 U.S.C. §1056(d)(1) (hereinafter §206(d)(1) of ERISA), the Wal-Mart Plan prohibits the alienation or assignment of a participant's accrued benefit in the Plan. The Plan allows for the distribution of a participant's accrued benefit only upon death, disability, retirement or termination of employment. Participant loans are not permitted.

Wal-Mart respectfully submits the above facts to show that while the legal issues in the instant case and in the Wal-Mart Appeal are similar, the factual situations in these cases are very different. Unlike Mr. Shumate, Mr. Green has no control whatsoever over the Wal-Mart Plan, Wal-Mart or Wachovia Bank. He is a middle manager in a large, publicly-held corporation. This company, and many others, have established retirement plans for the benefit of their employees designed to provide retirement income to those employees. These plans are not established as personal savings accounts for the employees, subject to withdrawal by the employee at his discretion.

Further, unlike the pension plan in the instant case, the Wal-Mart Plan has not been terminated, and Mr. Green is still employed by Wal-Mart. Thus, no event triggering a distribution of Mr. Green's accrued benefit under the terms of the Wal-Mart Plan has occurred. This presents an issue concerning the powers of a bankruptcy trustee which often arises in this area which is not being addressed by Petitioner and Respondent in the instant case.

Further, the instant case does not address the adverse income tax consequences which will result should a participant's accrued benefit in an active qualified retirement plan be turned over to a bankruptcy trustee for further distribution to the participant's unsecured creditors. In a series of private letter rulings (one of which was issued directly to Wal-Mart in connection with a prior bankruptcy proceeding), the Internal Revenue Service (the "Service") has taken the position that such a turnover would result in disqualification of the plan under I.R.C. §401(a)(13)(A). Disqualification of the Wal-Mart Plan would have severe adverse tax consequences to the participants and beneficiaries of the Wal-Mart Plan, as well as to Wal-Mart itself as the sponsor of the Plan.

The Court's decision in the instant case will in all likelihood not only be dispositive of the Wal-Mart Appeal, but would affect the retirement plans sponsored by other large companies. A determination by the Court that a bankruptcy trustee of a plan participant could reach that participant's accrued benefit to satisfy that participant's debts would eviscerate the very purpose such companies adopt such plans (and thwart the express Congressional intent of safeguarding a stream of retirement income to participants and their beneficiaries), and would expose such plans (and the plan sponsors) to severe adverse tax consequences. Wal-Mart and Wachovia Bank believe they have information relevant to these issues, and to this Court's consideration of the Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

I. 11 U.S.C. §541(a)(1) defines the bankruptcy estate to include all legal and equitable interests of the debtor in property as of the commencement of the case. However, 11 U.S.C. §541(c)(2) provides that a restriction on a transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a bankruptcy case.

Section 403(a) of ERISA (29 U.S.C. §1103) provides that the assets of an employee pension benefit plan must be maintained in a trust. ERISA §206(d)(1) provides that the pension plan must provide that the benefits provided under the plan may not be assigned or alienated. I.R.C. §401(a)(13)(A) requires, as a condition for tax qualification, that the plan of which the trust is a part must provide that benefits provided under the plan may not be assigned or alienated. Thus, transfers of a participant's beneficial interest in a trust maintained as a part of a qualified plan are restricted. That restriction is clearly enforceable under applicable nonbankruptcy law. Thus, that restriction on transfer is enforceable in a bankruptcy proceeding.

Section 541(c)(2) is unambiguous on its face, and resorting to its legislative history is unnecessary. Even if the legislative history of §541(c)(2) is reviewed, the results would be inconclusive. There is nothing in the statute, or in the Bankruptcy Code, to warrant limiting the phrase "applicable nonbankruptcy law" in §541(c)(2) to state law, much less to state spendthrift trust law. Finding that a participant's accrued benefit in a qualified plan is excludable from his bankruptcy estate harmonizes the provisions of the Bankruptcy Code, ERISA, and the

Internal Revenue Code on this issue. It prevents a creditor from circumventing ERISA §206(d)(1) by pushing a debtor into involuntary bankruptcy in order to reach his ERISA funds. It furthers ERISA's broader purpose of ensuring uniform treatment of pension benefits throughout the country.

II. Assuming, *arguendo,* that a participant's accrued benefit in a qualified plan is not excludable from the bankruptcy estate under 11 U.S.C. §541(c)(2), his accrued benefit in the plan would be exempt from his bankruptcy estate pursuant to 11 U.S.C. §522(b)(2)(A). Section 522(b)(2)(A) is also unambiguous on its face. It exempts from the bankruptcy estate any property that is exempt under federal law. Pension benefits under ERISA-qualified plans are exempt from judgment, garnishment, levy, execution, or other legal or equitable process. The purpose of ERISA §206(d)(1) is to safeguard retirement income for pensioners. It provides the same protection for retirement income from private pension plans as the prohibitions which are provided under federal law against garnishment of retirement benefits under the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act, and the Veterans' Benefits Act.

III. Assuming that a participant's accrued benefit in a qualified plan is not excludable from his bankruptcy estate under 11 U.S.C. §541(c)(2), and is not exempt from his bankruptcy estate under 11 U.S.C. §522(b)(2)(A), any distribution from the plan must still be in accordance with the terms of the plan. The filing of a bankruptcy petition, in and of itself, does not accelerate a participant's right to benefits under the plan. A qualified plan normally provides that a participant's right to benefits is usually triggered by the participant's death, disability,

retirement, or termination of service. If none of these events have occurred at the time the participant files a bankruptcy proceeding, then the participant is not entitled to a distribution of his benefit as of the filing date, and the bankruptcy trustee's rights to a distribution can be no greater than the participant. There is no provision in the Bankruptcy Code which grants such broad powers to the bankruptcy trustee, and such powers should not be implied.

IV. A turnover of a participant's accrued benefit in a qualified plan, in violation of I.R.C. §401(a)(13)(A), will result in a disqualification of the plan. There is no exception under I.R.C. §401(a)(13)(A) for turnovers in bankruptcy proceedings.

The Internal Revenue Service has consistently held, in a series of private letter rulings, that a turnover of a participant's accrued benefit in a qualified plan, not in accordance with the terms of the plan, will result in disqualification of the plan under I.R.C. §401(a)(13)(A). Such a disqualification would result in adverse tax consequences not only to the sponsor of the plan, but also to all other participants and beneficiaries in the plan.

ARGUMENT

I. A PARTICIPANT'S ACCRUED BENEFIT IN A QUALIFIED EMPLOYEE PENSION BENEFIT PLAN NOT DISTRIBUTABLE TO THE PARTICIPANT UNDER THE TERMS OF THAT PLAN IS EXCLUDED FROM THAT PARTICIPANT'S BANKRUPTCY ESTATE PURSUANT TO 11 U.S.C. §541(c)(2) BECAUSE ERISA §206(d)(1) CONSTITUTES "APPLICABLE NONBANKRUPTCY LAW".

The issue in the instant case is whether the Respondent, Joseph B. Shumate, Jr.'s, accrued benefit in the

Coleman Furniture Company Pension Plan (the "CFC Plan") constitutes an asset of his bankruptcy estate. 11 U.S.C. §541(a)(1) defines the bankruptcy estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." However, there is an important exception to this general rule, found at 11 U.S.C. §541(c)(2), which provides the following:

> "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

In determining whether §541(c)(2) applies to a trust in which a debtor has a beneficial interest, two things must be considered. First, is there a restriction on the transfer of that debtor's interest in the trust? Second, assuming there is such a transfer restriction, is the restriction enforceable under "applicable nonbankruptcy law"?

Mr. Shumate has a beneficial interest in the trust which is maintained as a part of the CFC Plan. Under ERISA, there are two basic types of plans an employer can establish for the benefit of his employees: (a) a "pension benefit plan", which provides for retirement income; and (b) a "welfare benefit plan", which provides for health, legal, vacation or training benefits. Both the CFC Plan and the Wal-Mart Plan come within the definition of a "pension benefit plan".

Further, both the Wal-Mart Plan and the CFC Plan are "qualified plans" as defined in I.R.C. §401. Title II of ERISA sets forth amendments to the Internal Revenue Code relating to pension benefit plans. A "qualified plan" under I.R.C. §401 means a pension benefit plan which meets certain requirements as set forth in that section, thereby granting significant tax benefits to the employer sponsoring the plan and the employees participating in

the plan. These tax benefits include (a) deductibility of contributions by the employer to the plan in the year of the contribution, (b) earnings on the trust fund formed as part of the plan are exempt from taxation, and (c) participants are taxed on benefits only upon distribution.

ERISA §206(d)(1) provides, with respect to all pension benefit plans, that:

> "(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

I.R.C. §401(a)(13)(A) (26 U.S.C. §401(a)(13)(A)) requires, as a condition for tax qualification, that:

> "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated."

These provisions are often referred to as the anti-assignment and anti-alienation rule (hereinafter "anti-alienation rule"). The purpose of the anti-alienation rule is "to safeguard a stream of income for pensioners (and their dependents . . .) . . . " *Guidry v. Sheet Metal Workers' National Pension Fund*, 493 U.S. 365, 376 (1990). In *Guidry*, this Court held that neither the garnishment provision of the Labor-Management Reporting and Disclosure Act, nor equitable principles like the constructive receipt doctrine, can override the anti-alienation rule. The Court noted that a specific statute, like ERISA §206(d)(1), will not be "controlled or nullified by a general one", *Id.* at 375.

A provision in a qualified plan required by the anti-alienation rule is a restriction on the transfer of a participant's interest in that plan. Moreover, this restriction is enforceable under nonbankruptcy law. It has not been

suggested that Mr. Shumate could have received a distribution of his account balance outside the express terms of the CFC Plan, or that Mr. Shumate's creditors could reach his account balance outside of bankruptcy. The issue is whether the anti-alienation rule constitutes, under 11 U.S.C. §541(c)(2), a "restriction . . . enforceable under applicable nonbankruptcy law."

Four circuits have taken the position that the ERISA anti-alienation rule is includable within the contemplation of "applicable nonbankruptcy law", resulting in exclusion of a participant's accrued benefit in a qualified plan from the bankruptcy estate under §541(c)(2). See, *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990); *In re Lucas*, 924 F.2d 597 (6th Cir. 1991); *Velis v. Kardanis*, 949 F.2d 78 (3rd Cir. 1991); and *Gladwell v. Harline (In re Harline)*, 950 F.2d 669 (10th Cir. 1991). Alternatively, four circuits have reached the conclusion that the anti-alienation rule is not, independently, a "restriction . . . enforceable under applicable nonbankruptcy law" within the meaning of §541(c)(2), but have determined that the scope of §541(c)(2) is limited to spendthrift trusts under applicable state law, and that retirement plans must qualify as such in order for the participant's accrued benefit to be excludable from the bankruptcy estate under §541(c)(2). See, *Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984) (dealing with a physician who was the sole shareholder of his professional corporation); *Goff v. Taylor (In re Goff)*, 706 F.2d 574 (5th Cir. 1983) (dealing with a self-employed retirement (Keogh) plan); *Daniel v. Security Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985) (also dealing with a physician who was the sole shareholder of his professional corporation); and *Lichstahl v. Bankers Trust (In re Lichstahl)*, 750

F.2d 1488 (11th Cir. 1985) (also dealing with a physician who was the sole shareholder of his professional corporation). The Seventh Circuit also apparently follows this later line of cases (see *Matter of LeFeber*, 906 F.2d 330 (7th Cir. 1990)), but this is not entirely clear. See, *Morter v. Farm Credit Services*, 937 F.2d 354 (7th Cir. 1991) (rejecting *Goff's* conclusion that §541(c)(2) refers only to "traditional" spendthrift trusts, but not mentioning ERISA). Likewise, the Ninth Circuit appears to have had some second thoughts concerning its holding in *Daniel*. See, *In re Kincaid*, 917 F.2d 1162, 1166 (9th Cir. 1990) ("We recognize a certain incongruity in the notion that only ERISA's anti-alienation provisions offer protection until bankruptcy, and only state spendthrift provisions do so in bankruptcy.")

Wal-Mart and Wachovia Bank believe that the holdings by the Third, Fourth, Sixth and Tenth Circuits cited above are correct, and that §541(c)(2) should not be narrowly construed to encompass only "traditional" spendthrift trusts under applicable state law. The anti-alienation rule, which is a federal statute designed to restrict the transfer of a participant's accrued benefit in a pension benefit plan, is a "restriction . . . that is enforceable under applicable nonbankruptcy law" within the meaning of §541(c)(2).

In *In re Moore, supra*, as in the Wal-Mart Appeal, the bankruptcy trustee took the position that the term "applicable nonbankruptcy law" under §541(c)(2) should be read narrowly to refer only to plans with transfer restrictions enforceable under state spendthrift trust law. The Fourth Circuit rejected this "overly restrictive interpretation" of §541(c)(2), and held that the term "applicable

nonbankruptcy law" is not limited to state spendthrift trust law:

> "The trustee in bankruptcy's narrow interpretation of §541(c)(2) cannot be squared with the section's broad language. 'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase 'applicable nonbankruptcy law' or in the remainder of §541(c)(2) supports that the phrase refers exclusively to state law, much less to state spendthrift trust law." *Moore* at 1477.

The court noted that the bankruptcy trustee's interpretation of "applicable nonbankruptcy law" was not consistent with other uses of the identical phrase throughout the Bankruptcy Code. When Congress intended to refer only to state law in the Bankruptcy Code, it did so explicitly. The court stated that an appeal to legislative history is inappropriate because the language of §541(c)(2) is clear, and legislative history is irrelevant to the interpretation of an unambiguous statute. *Id.* at 1479.

The court noted that several circuit courts have read the term "applicable nonbankruptcy law" in §541(c)(2) to refer only to state spendthrift trust law, but commented:

> "These decisions have, in the main, involved self-settled trusts in which the settlor is the beneficiary with the power to amend or to terminate the trust without penalty, whereas here the beneficiaries do not control the plan, cannot make unrestricted withdrawals from it, cannot borrow against it, and cannot amend it." *Moore* at 1478.

Having concluded that the term "applicable nonbankruptcy law" is not limited to transfer restrictions

enforceable under state spendthrift trust law, the court then concluded that ERISA §206(d)(1) does contain an enforceable transfer restriction that would bring that statute within the meaning of the term "applicable nonbankruptcy law" within the meaning of §541(c)(2). The overriding purpose of ERISA was to guarantee the security of employees' retirement income, and one of the primary means by which ERISA protects workers' pension benefits is through restrictions on the assignment and alienation of these benefits. The court notes at 1480:

> "[The bankruptcy trustee's] position would provide creditors with a means to circumvent this restriction on their access. We see no evidence that Congress intended to invite a creditor to push a debtor into involuntary bankruptcy in order to reach his ERISA funds."

The court stated that ERISA, the Bankruptcy Code, and the Internal Revenue Code can best be harmonized by reading "applicable nonbankruptcy law" under §541(c)(2) to include ERISA. This conclusion "furthers ERISA's broader purpose of ensuring uniform treatment of pension benefits throughout the country." *Id.* at 1480.

> "Our holding ensures that the security of employee retirement benefits will not depend upon the particularities of state spendthrift trust law. Were it otherwise, a state that did not recognize spendthrift trusts at all could nullify the anti-alienation provisions of ERISA – a result that is contrary to ERISA's general pre-emptive force. See, 29 U.S.C. §1144(a)." *Moore, supra,* at 1480.

This last point is especially relevant to plan sponsors such as Wal-Mart, whose operations extend across a number of states, and whose employees reside in a number of states. To support the Petitioner's position

regarding §541(c)(2) – that it refers only to traditional spendthrift trusts enforceable under state law – is to force upon ERISA-qualified plans the vagaries of individual state laws. Different participants in the same plan would find their accrued benefits treated completely differently in bankruptcy, depending upon their state of residence. This possible disparate treatment flies in the face of §514(a) of ERISA (29 U.S.C. §1144(a)). Further, a focus under §541(c)(2) on state spendthrift trust law will only continue the current multiplicity of suits and fervent litigation in this area.

The Third Circuit, in *Velis v. Kardanis, supra,* in addition to embracing the reasoning of the Fourth Circuit in *Moore, supra,* addressed the argument that if the term "applicable nonbankruptcy law" in §541(c)(2) includes both state and federal law, the exemption provisions of 11 U.S.C. §522(d)(10)(E) would be superfluous or meaningless. §522(d)(10)(E) provides an exemption for a debtor's right to receive –

> "(E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan . . . , unless . . . such plan . . . does not qualify under [I.R.C.] §401(a), 403(a), 403(b), 408, or 409 . . . "

It is clear from the plain language of §522(d)(10)(E) that it is dealing with distributions from a qualified plan, "which the debtor has a present and immediate right to receive." *Velis v. Kardanis,* 949 F.2d at 81. These are commonly referred to plans which are in "in pay" status, that is, a triggering event for distribution has occurred under the terms of the plan, and the participant (or his beneficiary) is receiving retirement, death or disability payments from the plan.

The importance of §206(d)(1) within the general scheme of ERISA has been underscored by this Court in

the recent decisions of *Mackey v. Lanier Collections Agency & Service,* 486 U.S. 825 (1988), and *Guidry,* cited earlier. In *Mackey,* this Court specifically noted that §206(d)(1) is applicable to ERISA *pension* benefit plans, not *welfare* benefit plans. The Court held that §206(d)(1) "bars the assignment or alienation of pension plan benefits." *Mackey* at 836. In *Guidry,* this Court decided that the trustee of a labor union pension plan, who admittedly had embezzled from a labor union, was still protected by ERISA §206(d)(1). The *Guidry* Court at 493 U.S. 365, 376:

> "Nor do we think it appropriate to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects the considered Congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task."

A finding that a participant's accrued benefit in a qualified plan is excluded from the bankruptcy estate of the participant under §541(c)(2) will not lead to abuses by debtors. The Internal Revenue Code limits the amount which may be contributed to a participant's account each year so as to prevent excessive accumulations. See, I.R.C. §415. Distributions prior to attainment of age 59½ or the occurrence of another qualifying event are subject to a 10% penalty. See, I.R.C. §72(t). Self-employed individuals maintaining plans may not borrow from their plans without obtaining an individual exemption from the Department of Labor (ERISA §408(d)), and loans to participants

under corporate plans, if permitted under the plan document, are severely restricted. See, I.R.C. §72(t), ERISA §408(b)(1).

An examination of this issue is necessary in order to harmonize the conflict among the Bankruptcy Code, the Internal Revenue Code, and ERISA, as well as to provide a consistency with respect to qualified pension plans among the states. To adopt the Petitioner's position is to contend that §541(c)(2) doesn't really mean what it says, that is, several words should be added, such as "state law", and even "state spendthrift trust law", and that there is an "implied" exception to ERISA §206(d)(1) and I.R.C. §401(a)(13)(A) for a bankruptcy trustee under the Bankruptcy Code. Concluding that ERISA §206(d)(1) constitutes "applicable nonbankruptcy law" would also be consistent with *Mackey* and *Guidry*. It is inconsistent to find that an embezzler's account balance in a qualified plan cannot be reached by the victims of that embezzlement, as was the case in *Guidry*, but that Mr. Shumate's account balance, or Mr. Green's account balance in the Wal-Mart Plan, can be reached by their creditors, simply because they are in bankruptcy.

II. A PARTICIPANT'S ACCRUED BENEFIT IN A QUALIFIED EMPLOYEE PENSION BENEFIT PLAN NOT DISTRIBUTABLE TO THAT PARTICIPANT UNDER THE TERMS OF THAT PLAN IS EXEMPT FROM THAT PARTICIPANT'S BANKRUPTCY ESTATE PURSUANT TO 11 U.S.C. §522(b)(2)(A).

Assuming, *arguendo*, that Mr. Shumate's account balance in the CFC Plan is not excludable from the bankruptcy estate under 11 U.S.C. §541(c)(2), his accrued benefit in the Plan is exempt from his bankruptcy estate

pursuant to 11 U.S.C. §522(b)(2)(A), which exempts from the bankruptcy estate:

> "Any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition . . . "

The ERISA anti-alienation rule clearly provides a nonbankruptcy federal exemption for a participant's interest in a qualified plan before that interest is distributable to the participant under the terms of the plan. While the accrued benefit is in trust for the benefit of the participant (and his beneficiaries), it is not subject to attachment, garnishment, levy, or execution.

This issue was considered by the courts in *Goff* and *Graham, supra*. Both cases held that the anti-alienation rule did not constitute a §522(b)(2)(A) federal exemption in a bankruptcy proceeding, primarily on the basis that the anti-alienation rule was not included in an "illustrative list of property which might be exempted under federal laws" set forth in the House and Senate Reports concerning §522(b)(2)(A). While the court in *Graham*, at 1274, noted that this list "was not meant to be exclusive", the court found "the failure of Congress to include ERISA plan benefits probative of Congressional intent that ERISA was not a 'federal law' upon which a §522(b)(2)(A) exemption could be based." However, this conclusion in *Graham* should be closely scrutinized in view of this Court's decision in *Guidry, supra*.

In *Guidry*, this Court reaffirmed the inviolable nature of the anti-alienation rule. At 493 U.S. 365, 376, the Court holds:

> "As a general matter, courts should be loathe to announce equitable exceptions to legislative

requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an anti-garnishment provision."

Further, it should be noted that this Court in *Guidry* equated the prohibition against garnishment provided by ERISA §206(d)(1) "with other statutory provisions designed to safeguard retirement income", citing the prohibition against garnishment of retirement benefits under the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act, and the Veterans Benefits Act. These federal prohibitions on garnishment are cited in *Goff* and *Graham* as "illustrative" of federal non-bankruptcy exemptions which are encompassed by 11 U.S.C. §522(b)(2)(A). In *Guidry*, the Court afforded the same status to the ERISA anti-alienation rule, which is applicable to private pension funds, as is afforded to other federal statutes which prohibit the alienation of other forms of retirement benefits.

In *In re Felts*, 114 Bankr. 131 (Bankr. W.D.Tex. 1990), the court addressed the argument that the anti-alienation rule is not included in the "illustrative list" in the House and Senate Reports concerning §522(b)(2)(A), *Felts* at 133:

> "The fact that Congress chose to provide an illustrative list of other federal law in its reports on 11 U.S.C. §522(b)(2)(A) certainly does not limit that other federal law to only those statutes listed:
>
> '[I]t is a non-sequitur to say that the *failure* to *include* something on an *illustrative* list is probative of an intent to exclude it from that list.'
>
> *In re Komet*, 104 B.R. 799 (B.R. W.D.Tex. 1989)." (Emphasis by the court.)

In *In re Starkey*, 116 Bankr. 259 (Bankr. D.Colo. 1990), the court found that the anti-alienation rule was an exemption under federal law and could be claimed under 11 U.S.C. §522(b)(2)(A). The *Starkey* court reviewed the *Mackey* and *Guidry* decisions, and concluded at 265:

> "Considering the *dicta* in *Mackey*, the holding in *Guidry*, and the strong view expressed by the Supreme Court that, in its opinion, it was the intention of Congress to create a federal exemption from involuntary alienation of pension benefits by the adoption of 29 U.S.C. §1056(d)(2), this Court concludes that ERISA must be considered to be another federal exemption for the purposes of 11 U.S.C. §522(b)(2)(A). The conclusion reached by the Court is consistent with the legislative history and properly harmonizes other potentially conflicting results."

In summary, the reasoning in *Goff* and *Graham* that the anti-alienation rule does not create an exemption under federal law, for purposes of §522(b)(2)(A), should now be re-examined, in light of the holding in *Guidry*. All of the federal statutes cited in *Guidry*, including ERISA §206(d)(1), reflect a "considered Congressional policy choice" that retirement benefits to pensioners are to be "safeguarded", whether those benefits are derived from private pension funds, as in the instant case and in the Wal-Mart Appeal, or from the federal government. There is no valid policy reason why one form of pension benefit is to be favored over another form of pension benefit.

III. IF A PARTICIPANT'S ACCRUED BENEFIT IN A QUALIFIED EMPLOYEE PENSION BENEFIT PLAN IS NOT DISTRIBUTABLE TO THAT PARTICIPANT UNDER THE TERMS OF THAT PLAN, THAT PARTICIPANT'S BANKRUPTCY TRUSTEE CANNOT FORCE A DISTRIBUTION OF THAT ACCRUED BENEFIT TO HIM FOR THE BENEFIT OF THAT PARTICIPANT'S UNSECURED CREDITORS, IN THAT THE BANKRUPTCY TRUSTEE ACQUIRES NO GREATER RIGHTS IN THE PLAN THAN THE PARTICIPANT HIMSELF.

It is a fundamental tenet of bankruptcy law that a bankruptcy trustee takes property of the debtor subject to the same restrictions on the property as existed prior to the bankruptcy. If valid property transfer restrictions bind the debtor, then the property comes into the bankruptcy estate (and into the hands of the bankruptcy trustee), subject to the same restrictions. See, *In Re Schauer,* 835 F.2d 1222, 1225 (8th Cir. 1987). This principle has been applied a number of times in bankruptcy cases dealing with qualified retirement plans.

In *In re DeWeese,* 47 Bankr. 251 (Bankr. W.D. N.C. 1985), the court held that the debtor's account in a qualified plan was property of the estate under 11 U.S.C. §541. However, the court went on to hold at 255-256:

> "Although the court finds that the debtor's interest in the profit sharing plan to be property of the estate, it is a fundamental tenet of bankruptcy law that a bankruptcy trustee can acquire no greater rights in property than the debtor possessed. [citation] Here, the debtor had only a vested, undivided interest in a plan of ever changing values wherein distribution was delayed for an indefinite period of time (until retirement, death, etc.). The debtor had made no contributions to the Plan, as these were solely borne by his employer; and he had no rights to use or transfer his interest prior to the end of his association with this employer. The full extent of his interest was a right to share in a future distribution of company stock. This share has not yet been identified, nor has his interest been valued. *And this, and this alone, is the interest to which the trustee succeeds.* Therefore, the court concludes that the debtor's interest, as of the petition date, became property of the estate by operation of law, and that there is nothing further available for turnover." (Emphasis added)

In *In re Silldorf,* 96 Bankr. 859 (C.D.Ill. 1989), like *De Weese,* the court found that the interest of the debtors in the plan was property of the bankruptcy estate. The issue then became, "one of defining just what those interests" were. *Id.* at 866. The court held at 866:

> "If a debtor does not possess an asset or a present right to demand, merely filing a petition for bankruptcy cannot create it. The court agrees that the Trustee is only entitled to the property or assets which the Debtors could demand. . . . Accordingly, because the debtor in this case was not entitled to a distribution of any nature from the Plan at the time of filing the petition, the bankruptcy Trustee is not entitled to compel a turnover of the assets sought herein."

In *In re Loe,* 83 Bankr. 641 (Bankr. D. Minn. 1988), the court concluded, "that the trustee has no immediate right to the funds representing Debtor's interest in the Plan; nor does he have any right to assign or sell the estate's interest in the Plan." *Id.* at 646. The court went on to hold at 646:

> "A debtor's rights may not be expanded beyond what they were at the commencement of the case . . . accordingly, the trustee's interest in the

pension plan must be limited to the same interest as the Debtors' interest. Since the Debtors have no right to present distribution . . . , neither does the trustee."

This issue is apparently not being addressed in the instant case for the reason that the CFC Plan has been terminated, and the accrued benefit of the participants are distributable to them pursuant to the terms of the Plan. However, if it is determined that the accrued benefit of a participant in a qualified plan is not excludable from his bankruptcy estate under 11 U.S.C. §541(c)(2), and is not exempt under 11 U.S.C. §522(b)(1)(A), then the issue should be addressed, since such a determination under §§541(c)(2) and 522(b)(1)(A) will invariably lead bankruptcy trustees to seek turnovers of the accrued benefit of plan participants totally contrary to the distribution and withdrawal provisions of the plans.

Distribution under a qualified plan is usually made after the occurrence of certain specified events, such as death, disability or termination of service of the participant. None of these events may have occurred as of the bankruptcy filing date, and it cannot be predicted as of that date as to when they might occur. As stated in *Kincaid, supra*, 917 F.2d at 1168, termination of employment is "like other random or unpurposive events which can affect the debtor." Simply because a participant is 100% vested in his account balance does not mean the participant has an immediate right to the distribution of that account balance. Further, what ultimately will be the *amount* of the distribution, when the account balance is distributable in accordance with the terms of the plan? In the case of the Wal-Mart plan, approximately 87% of the Plan's assets consist of common stock of Wal-Mart. This stock is publicly traded on the New York Stock Exchange

and the Pacific Stock Exchange, and as a result its value is ever changing. Lastly, because contributions to a plan may be totally discretionary with the plan sponsor (as in the case of a profit sharing or stock bonus plan), there is no assurance that any further contributions will be made. The plan's sponsor, in its discretion, could always simply discontinue the making of contributions to the plan, but not actually terminate the plan.

Concluding that a bankruptcy trustee's rights to a participant's account balance can be no greater than the participant himself does not necessarily mean that the account balance will never be available for the benefit of the participant's creditors. Presumably, at some time a distributable event under the plan will occur triggering a distribution of some amount to the participant. The interest of the bankruptcy trustee would then mature, and the funds would then be available for distribution to creditors. Admittedly, this may result in delay in the administration of the case. The bankruptcy trustee could decide either to abandon the participant's interest in the plan under 11 U.S.C. §554(b), on the basis that it is burdensome to the estate or that it is of inconsequential value and benefit to the estate, or the bankruptcy trustee could decide to keep the case open with the idea that a distributable event may occur in the near future (for example, the participant's employment is terminated), and the distribution will come into the bankruptcy estate at least to the extent it represents benefits accrued prior to bankruptcy.

There are no provisions in the Bankruptcy Code to support an immediate turnover of a participant's accrued benefit in a qualified plan to that participant's bankruptcy trustee, if that accrued benefit is not distributable to the participant under the terms of the plan at the time

of the filing of the bankruptcy petition. 11 U.S.C. §541(c)(1), which invalidates any restriction on the transfer of an interest of the debtor in property which is property of the bankruptcy estate, would not be sufficient, even if the court has concluded that a participant's account balance is property of the bankruptcy estate and is not exempt and, therefore, has determined that the restriction on alienation of the participant's account balance is not applicable. Even though a restriction on transfer is no longer applicable, the invalidation of this restriction does not transform a contingent right of the participant into an absolute right, and does not accelerate the unmatured and inchoate rights of a debtor in property at the time of the filing of the bankruptcy petition. That is an entirely separate issue. 11 U.S.C. §544, which provides that a trustee in bankruptcy is given the rights and powers of a judicial lien creditor of the debtor as of the commencement of the bankruptcy proceeding, is also not sufficient. There is absolutely no question that a mere judicial lien creditor of a participant in a qualified plan cannot attach a participant's account balance in the plan as of the commencement of the bankruptcy proceeding. Such an attachment is clearly prohibited by the anti-alienation rule.

Wal-Mart and Wachovia Bank urge the Court to address this issue in the instant case. The issue has not been adequately addressed by the cases which hold that a participant's accrued benefit in a qualified plan is not excludable from the bankruptcy estate under §541(c)(2) and is not exempt from the bankruptcy estate under §522(b)(1)(A).

IV. A TURNOVER TO A PARTICIPANT'S BANKRUPTCY TRUSTEE OF THAT PARTICIPANT'S ACCRUED BENEFIT IN A QUALIFIED EMPLOYEE PENSION BENEFIT PLAN NOT DISTRIBUTABLE TO THE PARTICIPANT UNDER THE TERMS OF THE PLAN WILL RESULT IN DISQUALIFICATION OF THE PLAN UNDER §401(a) OF THE INTERNAL REVENUE CODE OF 1986, AS AMENDED.

It has been suggested by bankruptcy trustees that the issue of tax disqualification as a result of a turnover of a participant's accrued benefit in violation of the terms of a qualified plan is a "red herring" in this area. This position is apparently based on a belief that such a turnover does not violate the anti-alienation rule, or that there is an implied amendment to the anti-alienation rule based on the subsequent enactment of the Bankruptcy Code.

In *Regan v. Ross*, 691 F.2d 81 (2nd Cir. 1982), the court had before it not a private pension plan governed by ERISA, but a state employee retirement plan governed by state law. The benefits payable to the debtors in that case were in "in pay" status, and the issue was whether the pension beneficiaries could require their pension systems to transfer a portion of their monthly benefits for distribution to creditors under Chapter 13 of the Bankruptcy Code. The *Regan* court noted at page 87, "that to the extent that Congress evidenced clear intent to include pension benefits in the property of a Chapter 13 estate – a matter which we believe is demonstrated above – it necessarily amended §401(a)(13) and applicable Treasury Regulations accordingly." *Regan* has been cited a number

of times for the proposition that a turnover of a participant's accrued benefit will not result in disqualification of the plan under I.R.C. §401(a).

However, the reasoning in *Regan* concerning the anti-alienation rule is clearly inconsistent with this Court's holding in *Guidry*, i.e., if exceptions to ERISA §206(d) are to be made, "it is for Congress to undertake that task." *Guidry* at 493 U.S. 365, 376. *Guidry* places the "implied amendment" rationale of *Regan* in serious doubt. On the other hand, the position of the Service on this issue has been crystal clear. In reviewing the series of private letter rulings which the Service have issued with respect to this matter, it is obvious that the Service does not recognize any judicial exception to I.R.C. §401(a)(13)(A) with respect to bankruptcy. See, Ltr. Rul. 9011037 (December 20, 1989), Ltr. Rul. 8910035 (no date given), Ltr. Rul. 8829009 (May 6, 1988), and Ltr. Rul. 81[illegible]20 (May 5, 1981). Of course, pursuant to I.R.C. §6110(j)[illegible] private letter rulings may not be used as precedent. The purpose of I.R.C. §6110(j)(2), however, is to prevent taxpayers from relying on private letter rulings issued to other taxpayers in their transactions or tax cases. Wal-Mart and Wachovia Bank are not seeking to rely on these private letter rulings issued by the Service with respect to the qualification of the Wal-Mart Plan, however, but wish to point out that the position of the Service as consistently expressed in these rulings cannot be ignored. These rulings are also consistent with the reasoning in *Guidry*, that is, if exceptions to ERISA §206(d)(1) are to be made these exceptions must be explicit in the federal legislation itself, not implied or judicially created.

Further, a private letter ruling has been issued by the Service to Wal-Mart and Wachovia Bank directly on this

issue. On December 4, 1987, Michael A. Parker, another participant in the Wal-Mart Plan, and his wife filed a petition in the United States Bankruptcy Court for the Western District of Missouri, Southern Division, seeking relief under 11 U.S.C. Chapter 7. A dispute arose between Wal-Mart and the bankruptcy trustee with respect to that proceeding, concerning a turnover of Mr. Parker's account balance in the Wal-Mart Plan to the bankruptcy trustee. As a part of the settlement, Wal-Mart submitted to the Service a ruling request, concerning whether a distribution from the Plan of a portion of Mr. Parker's vested account balance to the bankruptcy trustee would result in a disqualification of the Plan under I.R.C. §401(a)(13)(A). On September 28, 1989, the Service issued its ruling, concluding that a turnover of Mr. Parker's accrued benefit in the Plan to the bankruptcy trustee, pursuant to the filing of a turnover complaint by the bankruptcy trustee and a turnover order issued by the court pursuant thereto, would result in disqualification of the Plan under I.R.C. §401(a)(13)(A).

The Service has, therefore, directly addressed this issue with respect to the Wal-Mart Plan. This ruling was issued by the Service as Ltr. Rul. 8951067, dated September 28, 1989. It unequivocally states that a turnover in circumstances as the instant case or the Wal-Mart Appeal will result in disqualification of the plan under I.R.C. §401. While bearing in mind the admonition under I.R.C. §6110(j)(3), we ask the Court to note that Ltr. Rul. 8951067 was issued by the Service directly to Wal-Mart with respect to the Wal-Mart Plan. The position of the Service taken in the Ltr. Rul. 8951067 is entirely consistent with the Service's position in the other private letter rulings cited earlier.

Wal-Mart now employs over 374,000 persons on either a full-time or part-time basis. As of January 1, 1991, there were approximately 220,000 participants in the Wal-Mart Plan. Disqualification of such a plan would have severe adverse consequences to the plan participants and beneficiaries, as well as to the sponsoring employer. Plan earnings would no longer be tax exempt, plan contributions will no longer be tax deductible, and it is reasonable to believe that the benefits of plan participants who are not parties to the bankruptcy case would be significantly affected.

The prospect of disqualification is a serious issue, and should be addressed accordingly. It cannot be dismissed on an assumption that such a drastic result would never follow the turnover of a single participant's account balance. As stated in *Moore* at 1480:

> "Furthermore, our holding avoids *the spectre of a bankruptcy trustee disqualifying an entire plan from tax exempt status by seeking turnover of a single bankrupt's interest in the plan.* Under the trustee's interpretation, ERISA does not withhold the debtor's interest in an ERISA-qualified profit sharing and pension plan from the bankruptcy estate. However, *a plan's ERISA-qualification and tax exempt status depend on compliance with [the anti-alienation rule]. If §541(c)(2) does not recognize ERISA as 'applicable nonbankruptcy law' that operates to exclude pension interests from the bankrupt's estate, then the plan's anti-alienation provisions will be violated and the plan may be subject to disqualification and loss of tax exempt status. [Citation] We do not think Congress intended such a result.*" (Emphasis added)

In summary, allowing a turnover of a participant's account balance to that participant's bankruptcy trustee before the participant's account balance would be distributable to him under the terms of the plan would necessitate the carving out of a judicial exception to ERISA §206(d)(1) with respect to bankruptcy proceedings. Such judicial exceptions are not recognized under I.R.C. §401(a)(13)(A) and, therefore, would result in disqualification of the plan. Such a result would be inequitable not only with respect to the plan sponsor, but also to the other plan participants and beneficiaries. To adopt the Petitioner's position is to leave qualified plans caught between the clashing rocks of Scylla – to turn over a participant's accrued benefit or face the possibility of contempt – and Charybdis – the risk of plan disqualification for obeying a court order. It clearly was not the intent of Congress to force plan sponsors and administrators to make such a Draconian choice.

CONCLUSION

For the foregoing reasons, and those stated in the brief of Respondent, Wal-Mart and Wachovia Bank respectfully request that this Court affirm the Court of Appeals for the Fourth Circuit, and find that Mr. Shumate's accrued benefit in the CFC Plan is excludable from his bankruptcy estate under 11 U.S.C. §541(c)(2), or, alternatively, that this accrued benefit is exempt from his bankruptcy estate under 11 U.S.C. §522(b)(2)(A). Further, should the Court determine that Mr. Shumate's accrued benefit is includable in his bankruptcy estate, and is not so exempt, Wal-Mart and Wachovia Bank request the Court to address the issues of a bankruptcy trustee's

power to force a distribution from a qualified plan contrary to its terms, and the tax consequences to the plan and the plan sponsor on such a distribution.

Respectfully submitted,

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(9)

No. 91-913

In The

Supreme Court of the United States

October Term, 1991

JOHN R. PATTERSON, Trustee,

Petitioner,

vs.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION OF HALLMARK CARDS, INCORPORATED FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND ACCOMPANYING BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Hallmark Cards, Incorporated ("Hallmark") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for Respondent has been obtained, but the attorney for Petitioner has refused to consent to the filing of a brief by Hallmark as *amicus curiae*.

Hallmark has an interest in this case because it is involved in several lawsuits with the same issues as those presented in this case. Hallmark is the administrator of several pension plans for 21,000 employees, some of whom reside in each federal circuit. To date, Hallmark has refused to turn over employees' pension plan interests to trustees in bankruptcy, because to do so would

violate the terms of its pension plans and could lead to disqualification of its pension plans by the Internal Revenue Service. One Bankruptcy Judge in the Western District of Missouri has ordered Hallmark to turn over an employee's interests in the Hallmark plans; that case is currently on appeal.

The positions of the parties herein will not adequately address Hallmark's interests because the facts in the case at bar center on an executive with some measure of control over the administration of the pension plan at issue. Petitioner has stated that the issue before the Court is "whether a debtor in bankruptcy, with control over and the power to revoke a pension plan, can exclude or exempt his interest in such a plan from his bankruptcy estate". Brief for Petitioner at 13. However, resolution of this case will have an impact on many pension plans throughout the nation that are not controlled by employees filing for bankruptcy. For example, none of the Hallmark employees who have filed for bankruptcy have had any involvement in the administration of Hallmark's pension plans. Nevertheless, this Court's decision on the inter-relationship of the Bankruptcy Code and the Employee Retirement Income Security Act ("ERISA") may impact all employees of Hallmark. If Petitioner's position is accepted, the pension benefits of all Hallmark employees are jeopardized.

Although Hallmark supports the position of Respondent in this case, Respondent's arguments do not adequately address the situation of a large employer – such as Hallmark – that is faced with the dilemma of protecting the pension benefits of thousands of employees while

complying with court orders that might cause disqualification of the pension plans and disastrous tax consequences for all participants.

Moreover, Hallmark faces differing results in different federal circuits if the Petitioner's arguments are accepted. There is a sharp split among the United States Courts of Appeals that have considered this issue – the courts in five judicial circuits have ruled that the pension benefits must be turned over to a trustee in bankruptcy for distribution to his creditors, while the courts in four circuits have reached the opposite conclusion.

For these reasons, Hallmark believes that the Court should consider the perspective of national employers when resolving this case. Neither of the parties herein brings that perspective to the Court.

Respectfully submitted,

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On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE HALLMARK CARDS, INCORPORATED IN SUPPORT OF RESPONDENT

STATEMENT OF HALLMARK'S INTEREST IN THE CASE

This case will determine whether the creditors of a bankrupt employee should have access to the employee's accrued pension benefits. It is clear that the same creditors could not reach the pension benefits outside of bankruptcy.

Hallmark Cards, Incorporated ("Hallmark") is the world's largest manufacturer of greeting cards and related personal communications products. The company has established one of the best employee benefit packages

in the United States.[1] The cornerstone of this benefit package is Hallmark's Employee Profit Sharing and Ownership Plan, a qualified pension benefit plan with assets in excess of $1.3 billion. The benefit package also includes three other qualified pension benefit plans with assets exceeding $500 million. More than 21,000 employees throughout the United States are eligible to participate in one or more of Hallmark's pension plans.

The issue in this case – whether an employee's interest in a pension plan is an asset of his estate in bankruptcy – is significant to Hallmark because the fundamental purpose of its pension plans is to provide for Hallmark employees and their families in retirement. Hallmark has a legitimate interest in seeing that benefits accrued under its pension plans are preserved for their intended purposes.

Equally important to Hallmark are the potential consequences of paying benefits to a trustee in bankruptcy in violation of the anti-alienation provisions in its pension plans. ERISA requires that a qualified pension benefit

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[1] For example, when Hallmark's Career Reward Program was created in 1956, it was hailed as "the country's most liberal employee-benefit and profit-sharing plan." Freedgood, *Joyce Hall is Thinking of You*, 58 FORTUNE 94 (December 1958). More recently, the benefit program was identified as the primary reason Hallmark was selected as one of the nation's top employers in R. LEVERING, M. MOSKOWITZ & M. KATZ, THE 100 BEST COMPANIES TO WORK FOR IN AMERICA 131-32 (1984) (Hallmark ranked in top ten companies), and by WORKING MOTHER in each of the years 1986 through 1991. *See* Moskowitz and Townsend, *The 85 Best Companies for Working Mothers*, 14 WORKING MOTHER, No. 10 (October 1991).

plan be administered in accordance with the plan document; failure to do so is a breach of Hallmark's fiduciary duty which could result in liability. 29 U.S.C. §§ 1104(a)(1)(D) and 1109. Failure to administer the plan in accordance with its terms could also result in loss of the tax-exempt status for the plan and trust. If a pension plan is disqualified as tax-exempt, all accrued benefits would be immediately taxable to participants which would effectively destroy the plan. *See infra*, pp. 26-29.

For these reasons, Hallmark has vigorously contested all attempts to require turnover of employee benefits from its qualified pension plans. Thus, Hallmark – like many other national employers – has become ensnared in repeated bankruptcy disputes where the pension plan interest of the employee is the debtor's largest asset. It is important that this Court consider the impact of its decision in this case on millions of employees who participate in pension plans established by their employers and who – unlike Respondent – have no control over the administration of their pension plans.

SUMMARY OF ARGUMENT

Whether a debtor's interest in a pension plan should be available to creditors in bankruptcy depends on the inter-relationship of two federal statutes – the Employee Retirement Income Security Act of 1974 ("ERISA") and the Bankruptcy Code.[2] Early decisions by several United

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[2] ERISA included four titles. Titles I, III, and IV are codified in 29 U.S.C. §§ 1001-1461. Title II of ERISA amended

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States Courts of Appeals found a "conflict" between ERISA and the Bankruptcy Code. These cases involved debtors with large interests in pension plans which they established and controlled and in which they were often the sole participants. The courts in those cases ignored the plain language of the Bankruptcy Code which excludes or exempts ERISA pension plan interests from the bankruptcy estate. Instead, these courts focused on ambiguous legislative history to justify the desired result.

The "conflict" between ERISA and the Bankruptcy Code is non-existent if the plain language of both statutes is read to exclude pension benefits from the bankruptcy estate. Excluding pension assets will also give full effect to ERISA's dual purposes of protecting retirement income and creating a uniform pension law throughout the nation.

ARGUMENT: REASONS FOR RULING FOR RESPONDENT

I. ERISA AND THE BANKRUPTCY CODE ARE NOT IN CONFLICT.

This Court has warned that "courts are not at liberty to pick and choose among congressional enactments, and

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many different sections of the Internal Revenue Code (IRC) to properly coordinate the tax provisions governing pension plans with the new Labor statute. References in this brief to ERISA will be to the original sections of that Act, as amended, and references to the IRC shall mean the Internal Revenue Code of 1986, as amended. References to the "Bankruptcy Code" shall mean the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101-1330.

when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Although Bankruptcy Code § 541(a), 11 U.S.C. § 541(a), broadly defines the bankruptcy estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case," Bankruptcy Code § 541(c)(2) provides that "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2). In other words, a debtor's interest in a trust is not included in his bankruptcy estate if the trust interest is subject to an enforceable restriction on transfer. In addition, property that is included in a debtor's bankruptcy estate may also be exempted from liquidation and distribution among his creditors by Section 522. Bankruptcy Code § 522(b)(2)(A) exempts from distribution "any property that is exempt under Federal law other than subsection (d) of this section", as well as property exempt under state law of the debtor's domicile. 11 U.S.C. §§ 522(b)(2)(A) and 522(d). Thus, a debtor's interest in a trust is not available to his creditors in bankruptcy if either (1) the interest is subject to an enforceable restriction on transfer so that the trust interest never enters the bankruptcy estate, or (2) the trust interest is included in the estate but exempted from distribution by federal law other than Bankruptcy Code § 522(d).

ERISA § 206(d)(1) requires that "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1).

ERISA § 403 generally requires all assets of a pension benefit plan to be held in trust. 29 U.S.C. § 1103. IRC § 401(a)(13)(A) states that a pension trust will not qualify as a tax-exempt entity under IRC § 501 "unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. §§ 401(a)(13)(A) and 501.

Therefore, the issue in this case should be resolved in favor of Respondent because the anti-alienation provisions required by ERISA and the IRC are enforceable restrictions under "applicable nonbankruptcy law" so that a debtor's interest in the pension plan never becomes part of the bankruptcy estate. Moreover, even if the interest is included in the estate, ERISA and the IRC provide an exemption of the interest in the pension plan and trust "under Federal law other than" Bankruptcy Code § 522(d).

ERISA and the Bankruptcy Code can be reconciled quite easily by simply reading and giving effect to the plain and unambiguous language of both statutes. "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" *Anderson v. Raine (In re Moore)*, 907 F.2d 1476, 1479 (4th Cir. 1990) (quoting from *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987)). This Court should resolve the split among the Courts of Appeals by directing lower courts to return to this fundamental principle of statutory construction.

A. The Plain Meaning of the Phrase "Applicable Nonbankruptcy Law" in Bankruptcy Code § 541(c)(2) Includes ERISA.

1. Early Cases Were Based on Equitable Considerations and Improperly Relied on Legislative History.

Bankruptcy Code § 541(c)(2) on its face excludes a debtor's interest in an ERISA pension trust from his bankruptcy estate: ERISA is "applicable" to pension plan trusts, it is "nonbankruptcy law", and the transfer restrictions which it requires to be included in pension plans have, except in bankruptcy, been uniformly held to be enforceable. *See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990).

Unfortunately, the first cases on this issue to reach the courts of appeals involved self-employed professionals who established and controlled their own pension plans. These courts held that the words "applicable nonbankruptcy law" do not mean what they say; they found that what Congress *really* meant to exclude from the bankruptcy estate was only an interest in a trust which qualifies as a traditional spendthrift trust under state law. *See Goff v. Taylor (Matter of Goff)*, 706 F.2d 574 (5th Cir. 1983); *Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).[3] *Accord Regan v. Ross*, 691

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[3] The United States Courts of Appeals for the Fifth Circuit in *Goff* and the Eighth Circuit in *Graham* set out the arguments

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F.2d 81 (2d Cir. 1982) (involving state employee retirement system not subject to ERISA).

To prevent the professional and self-employed debtors from shielding large amounts in their pension plans, the courts in *Goff*, *Graham* and other early decisions ignored the plain statutory language. Instead, these courts considered the ambiguous legislative history of Section 541(c)(2) and concluded that Section 541(c)(2) referred solely to traditional spendthrift trusts. The courts further concluded that since these debtors established and controlled the trusts, the trusts were not traditional spendthrift trusts.

Petitioner's arguments follow the erroneous reliance of the *Goff* and *Graham* Courts on legislative history rather than on the statutory language. Brief for Petitioner at 38-39. This Court has repeatedly said that legislative history is to be considered only if the statutory language is unclear or ambiguous. *See Toibb v. Radloff*, ___ U.S. ___, 111 S.Ct. 2197, 2200 (1991); *Davis v. Michigan Department*

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in support of their position that Section 541(c)(2) should be limited to state spendthrift trust law. None of the later opinions added to the argument, so this brief will refer to *Goff* and *Graham* as representative of these cases.

Some earlier lower court cases did adopt a more literal reading of Bankruptcy Code §§ 541(c)(2) and 522(b)(2)(A). *See, e.g.*, *In re Threewitt*, 24 Bankr. 927 (D. Kan. 1982); *In re Pruitt*, 30 Bankr. 330 (Bankr. D. Colo. 1983); *In re Mosley*, 42 Bankr. 181 (Bankr. D.N.J. 1984). These courts were not encumbered with the later result-oriented precedents established by appellate court decisions such as *Goff* and *Graham* and therefore applied the plain meaning to the statutory language.

of Treasury, 489 U.S. 803, 808 n.3 (1989); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199 (1977). Thus, there was no need for the Courts in *Goff* and *Graham* to look beyond the plain meaning of the statute.

Even if considered, the legislative history of the Bankruptcy Code on this subject is inconclusive. The Courts in both *Goff* and *Graham* cited House and Senate reports to support their conclusion that Section 541(c)(2) does not include ERISA as "applicable nonbankruptcy law". *Goff*, 706 F.2d at 581-82; *Graham*, 726 F.2d at 1271-72. However, these congressional reports state only that the Bankruptcy Code "continues over" or "preserves" the treatment afforded spendthrift trusts under the old Bankruptcy Act. The reports contain nothing delimiting the phrase "applicable nonbankruptcy law"; they simply indicate that state spendthrift trust laws are included within the phrase "applicable nonbankruptcy law".

While there might have been equitable reasons to include the pension assets of the debtors in *Goff* and *Graham* in their bankruptcy estates, the statutory interpretation was nevertheless faulty. The erroneous use of legislative history created a statutory interpretation which has now been extended to plans – such as Hallmark's – in which there are thousands of participants who have no involvement in the administration of the pension plans.[4]

[4] The result-oriented nature of the early decisions was noted by the Bankruptcy Court for the Western District of

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2. More Recent Cases Have Correctly Relied on the Plain Meaning of the Phrase "Applicable Nonbankruptcy Law."

Recently, several courts of appeals have correctly concluded that Bankruptcy Code § 541(c)(2) *does* mean what it says. *See Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1991); *Velis v. Kardanis*, 949 F.2d 78 (3d Cir. 1991); *Gladwell v. Harline (In re Harline)*, 950 F.2d 669 (10th Cir. 1991). In *Moore*, the Court of Appeals for the Fourth Circuit ruled that

> "Applicable nonbankruptcy law" means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of

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Oklahoma in *In re Burns*, 108 Bankr. 308, 314 (Bankr. W.D. Okla. 1989). Petitioner appeals to the same equitable considerations by emphasizing the control that Respondent had over the pension plan at issue in this case. Brief for Petitioner at 55-58. However, the Court's decision in this case will impact many employees who have no real control over their pension plans. In fact, when applying spendthrift trust law to pension plans, courts in the Western District of Missouri have found that simply because an employee could quit his job and obtain the money in his pension plan account he had too much "control" for the plan to qualify as a spendthrift trust. Thus, even where the contributions were made by the employer, if the employee can quit and receive a payout, these courts have ordered turn over of the pension plan assets to the Bankruptcy Trustee. *Wachovia Bank and Trust v. Wear (In re Green)*, 123 Bankr. 327 (Bankr. W.D. Mo. 1990); *In re Farrell*, Case No. 90-40864 (Bankr. W.D. Mo. Feb. 19, 1991) (involving Hallmark's pension plans).

> § 541(c)(2) suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law.

907 F.2d at 1477. These courts did not find it necessary to look beyond the statute to the legislative history. As the *Moore* Court concluded, "[t]he clarity of the statutory term is simply not clouded by the legislative history." 907 F.2d at 1479.

Moreover, as discussed in these recent cases, restricting the phrase "applicable nonbankruptcy law" to mean only state spendthrift trust law is inconsistent with other interpretations of the same phrase throughout the Bankruptcy Code, where the phrase has been held to refer to federal as well as state law.[5] *Moore*, 907 F.2d at 1477-78; *Velis*, 949 F.2d at 81; *Harline*, 950 F.2d at 674. As noted in *Moore*, when Congress intended to refer to "state law", it did so explicitly.[6] 907 F. 2d at 1477-78. In the case at bar, the Fourth Circuit stated that in *Moore*, it had

> looked to the plain language of the statute and found "applicable nonbankruptcy law" to be not

[5] For example, Bankruptcy Code § 1125(d) states that whether postpetition disclosure statements contain adequate information is "not governed by any otherwise applicable nonbankruptcy law" which has been held to include federal securities law. Bankruptcy Code § 108(a) extends the time in which a trustee can pursue a cause of action which the debtor could have pursued in accordance with the tolling provisions of "applicable nonbankruptcy law" which has been held to include the Racketeer Influenced and Corrupt Organization Act. *See Moore*, 907 F.2d at 1477-78.

[6] *See, e.g.*, Bankruptcy Code §§ 109(c)(2), 362(b)(12), 522(b)(1) and (2), 523(a)(5), 903, and 1145(a).

> limited to state law but also to embrace federal statutes, including ERISA. . . . [B]ecause ERISA enforces restrictions on the transfer of pension interests under its non-alienation requirement, it constitutes an "applicable nonbankruptcy law."

Shumate v. Patterson, 943 F.2d 362, 363-64 (4th Cir. 1991) (footnote omitted).

B. ERISA Is "Federal Law Other Than" Bankruptcy Under the Plain Meaning of Bankruptcy Code § 522(b)(2)(A).

If the plain meaning of Bankruptcy Code § 541(c)(2) excludes a debtor's interest in an ERISA pension plan from the bankruptcy estate, then no further inquiry is necessary. Nevertheless, there is an alternative provision in the Bankruptcy Code which would also prevent a bankruptcy trustee from obtaining a debtor's pension benefits.

Bankruptcy Code § 522(b) permits a debtor to exempt certain property from his bankruptcy estate in order to permit him a "fresh start." An individual debtor may choose to exempt either (1) property that is specified in subsection (d) of Section 522 (unless the debtor's domicile has "opted out" of the federal exemptions) or (2) property that is exempt under either "Federal law, other than subsection (d)" or the state law of the debtor's domicile. ERISA and the Bankruptcy Code can be reconciled and given full effect by recognizing that ERISA is "Federal law other than" Bankruptcy Code § 522(d) and

that ERISA's anti-alienation provisions exempt a participant's accrued benefits in a pension plan from any form of judicial process.[7]

Petitioner argues – and the Courts in *Goff* and *Graham* concluded – that ERISA does not create an exemption under "Federal law other than" the bankruptcy exemptions in Section 522(d). To reach this conclusion, Petitioner urges this Court to follow the reasoning in *Goff* and *Graham* and consider legislative history despite the unambiguous language of the statutes. In discussing Section 522(b)(2)(A), House and Senate reports listed "some of the items that may be exempted under Federal laws other than" the new Bankruptcy Code, H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 360, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6316. Although acknowledging that this list was not intended to be exhaustive, the Courts in *Goff* and *Graham* concluded that the omission of ERISA from the list was "probative" of congressional intent that ERISA was not one of the "Federal laws" under which an exemption could be claimed pursuant to Bankruptcy Code § 522(b)(2)(A). *Goff*, 706 F.2d at 585; *Graham*, 726 F.2d at 1274.

Discussing the interaction of ERISA and the Bankruptcy Code in another context, this Court stated that

> . . . the language of a statute . . . is not to be regarded as modified by examples set forth in

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[7] This argument was reserved by the Fourth Circuit in its opinion below, but was addressed by both parties in their briefs on the Petition for Certiorari and by Petitioner in his opening brief. *See* Brief for Petitioner at 49-55.

> the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not, as the Court of Appeals apparently thought, a definitive interpretation of a statute's scope.

Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 110 S. Ct. 2668, 2677 (1990). If Congress had intended to limit federal exemptions to those established by the statutes on the illustrative lists, it would have listed those statutes in the Bankruptcy Code.

Early appellate court decisions on this issue avoided giving Section 522(b)(2)(A) its plain meaning, and more recent appellate decisions have not found it necessary to address the question since the cases were resolved under Section 541(c)(2). However, several bankruptcy courts have recently held that ERISA does provide a federal exemption under Section 522(b)(2)(A). *In re Komet*, 104 Bankr. 799 (Bankr. W.D. Tex. 1989); *In re Burns*, 108 Bankr. 308 (Bankr. W.D. Okla. 1989); *In re Messing*, 114 Bankr. 541 (Bankr. E.D. Tenn. 1990); *In re Starkey*, 116 Bankr. 259 (Bankr. D. Colo. 1990). The Bankruptcy Court in *Komet* stated:

> [ERISA §] 206(d)(1) has been held by numerous federal courts to insulate retirement benefits from liability to state law levy or attachment, and thus functions as a privilege created by law sheltering certain property from creditor attachment – in short, an exemption created by federal law. Section 206(d) thus creates a federal exemption properly cognizable in bankruptcy, under the "other federal law" rubric of Section 522(b)(2)(A).

104 Bankr. at 808.

C. Bankruptcy Code § 522(d)(10)(E) Is Not Rendered Superfluous If "Applicable Nonbankruptcy Law" Includes ERISA.

As explained above, unless the state of his domicile has opted out of the federal exemptions, a debtor may elect to exempt property specified in Bankruptcy Code § 522(d). Section 522(d)(10)(E) generally exempts a

> debtor's right to receive . . . a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor . . . .

11 U.S.C. § 522(d)(10)(E). Petitioner claims that this exemption will be rendered "superfluous" or "nugatory" if ERISA is found to be "applicable nonbankruptcy law" so that a debtor's interest in a pension plan is excluded from bankruptcy. Brief for Petitioner at 24-33.

This argument was rejected by the Third Circuit in *Velis*, which examined the different purposes of Sections 541 and 522:

> The argument that if "applicable nonbankruptcy law" in § 541(c)(2) includes both state and federal law, the exemption provisions of § 522(d)(10)(E) would be superfluous or meaningless overlooks the distinctions between the two sections. Section 522 deals with *distributions* made from a pension plan and distributions which the debtor has a present and immediate right to receive. Even if pension plan assets in the hands of a trustee are beyond the reach of creditors because not a part of the debtor's estate under § 541(c)(2), distributions

> made from the plan to the debtor would not enjoy such protection in the absence of exemption under § 522(d)(10)(E).

949 F.2d at 81-82 (emphasis in original; citation omitted). *See also Harline*, 950 F.2d at 675.

Petitioner claims that this view "attempts to create a distinction which does not exist." Brief for Petitioner at 32. However, there is a very real difference between an interest in a pension trust that cannot be paid under the terms of the trust until some future event, such as termination of employment or attainment of a specified retirement age, and the right to receive an immediate payment from the same pension plan and trust.

Furthermore, the exemption provided by Section 522(d)(10)(E) covers a plethora of pension plans, savings plans, bonus plans, and other employment benefits that are not subject to the anti-alienation provisions of ERISA. Excluding an interest in an ERISA plan and trust under Section 541(c)(2) does not make this exemption "superfluous" or "nugatory".

II. EXCLUDING OR EXEMPTING PENSION PLAN ASSETS FROM THE BANKRUPTCY ESTATE IS CONSISTENT WITH THE MOST RECENT SUPREME COURT DECISION ON ERISA'S ANTI-ALIENATION PROVISIONS.

This Court recently considered the anti-alienation provisions of ERISA § 206(d)(1) in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990), and emphasized the absolute nature of ERISA's anti-alienation provisions. In *Guidry*, a union official had embezzled

money from the union, which sought to impose a constructive trust on benefits payable to the official from a union pension plan to satisfy a judgment obtained by the union. The district court imposed the constructive trust in favor of the union, relying on the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 401-531, to find a "narrow exception" to ERISA's anti-alienation provisions where a union and its members were "damaged by the knavery of a union official". 493 U.S. at 370 (quoting district court opinion). The United States Court of Appeals for the Tenth Circuit affirmed, reasoning that ERISA's anti-alienation provision could not be invoked to protect a dishonest plan fiduciary whose breach of duty injured the beneficiaries of the plan.

However, this Court reversed, and would not countenance an end run on the express prohibition found in ERISA § 206(d)(1), "unless some exception to the general statutory ban is applicable." *Guidry*, 493 U.S. at 372. After concluding that LMRDA did not override the plain language of ERISA, this Court also made clear that the union official's wrongdoing did not justify an "equitable remedy":

> Nor do we think it appropriate to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits. . . .
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory texts. The creation of such

> exceptions, in our view, would be especially problematic in the context of an anti-garnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears unequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be "especially" inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Id. at 376-77 (emphasis in original).[8]

Petitioner seeks to distinguish the facts of this case by arguing that *Guidry* was not a bankruptcy case. Brief for Petitioner at 19-20, 44-46. However, the facts of *Guidry* were even more compelling for the creditors than those in this case. In *Guidry*, the judgment creditor had been

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[8] The Court in *Guidry* reserved the question whether a breach of fiduciary duty *to the plan* rather than to the union would justify a constructive trust or other form of garnishment against the fiduciary's benefits from the plan. 493 U.S. at 373. However, the United States Court of Appeals for the Fifth Circuit, relying on *Guidry*, subsequently concluded that even a breach of fiduciary duty to the plan could not justify an exception to ERISA's absolute prohibition on alienation. *Herberger v. Shanbaum*, 897 F.2d 801, 803-04 (5th Cir. 1990).

injured by the debtor's *criminal misconduct*. The LMRDA did not create a "narrow exception" to ERISA's prohibition on alienation; neither does the Bankruptcy Code. If neither employee malfeasance nor criminal misconduct justifies an equitable exception to ERISA's prohibition on alienation of pension benefits, certainly a bankruptcy proceeding, where a debtor seeks only the opportunity to settle his debts, does not justify such an exception.

III. THE PUBLIC POLICY OF BOTH ERISA AND THE BANKRUPTCY CODE WILL BE BETTER SERVED BY EXCLUDING OR EXEMPTING PENSION BENEFITS FROM THE BANKRUPTCY ESTATE.

Petitioner argues that the policies behind the Bankruptcy Code override the policies of ERISA (Brief for Petitioner at 42), but does not explain why one federal statute should be preferred over another. In recent opinions such as *Guidry* and others discussed below, this Court has emphasized that two of ERISA's primary purposes are to protect retirement benefits and to ensure uniform regulation of pension plans. The interpretation of Bankruptcy Code § 541(c)(2) advocated by Petitioner would negate the uniform treatment of pension plans and subject them to the vagaries of state spendthrift law to determine when and where pension benefits would be included in a bankruptcy estate. By contrast, the position taken by Respondent and by the Court of Appeals for the Fourth Circuit in its opinion below would reaffirm a single, national standard and protect retirement income when such protection is needed most.

A. ERISA's Most Important Purpose Is to Safeguard Retirement Income.

When adopting ERISA, Congress stated that the statute's

> most important purpose will be to assure American workers that they may look forward, with anticipation, to retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society.

H.R. Rep. No. 93-533, 93rd Cong., 1st Sess., at 8 (1973), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4646.

The anti-alienation provisions of ERISA and the IRC were intended not only to prevent an employee from improvidently bargaining away his retirement benefits through voluntary assignment or alienation but also to protect his pension benefits against claims of general creditors; they were to "further insure that employee's accrued benefits are actually available for retirement purposes . . . ." H.R. Rep. No. 93-807, 93rd Cong., 2d Sess., at 68 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4734.

In *Guidry*, this Court recognized and emphasized this congressional purpose:

> [ERISA §] 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

493 U.S. at 376.[9] Relying on *Guidry* in its opinion below, the Fourth Circuit recognized the strong public policy of ERISA to protect retirement benefits from creditors. *Shumate*, 943 F.2d at 365. It is impossible to reconcile this policy with Petitioner's view – and that expressed in *Goff* and *Graham* – that pension benefits are to be included in the bankruptcy estate and subject to distribution among creditors. Congress made no exceptions to ERISA's anti-alienation language when adopting the Bankruptcy Code; the congressional policy to safeguard retirement income is perhaps most needed during insolvency proceedings.

B. Congress Intended a Uniform Federal Law to Apply to Pension Plans.

ERISA was intended to establish a uniform federal law to govern all pension plans. To accomplish this result, Congress included a broad preemption of state law in ERISA § 514(a). 29 U.S.C. § 1144(a). When introducing the Conference Report on ERISA, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, stated:

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[9] In fact, Congress did create an exception to the anti-alienation provisions of ERISA and the IRC as originally adopted to permit assignment or alienation of an employee's pension benefits for alimony, child support or division of marital property rights. ERISA § 206(d)(3) and IRC §§ 401(a)(13)(B) and 414(p), added by the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1483.

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating threat of conflicting or inconsistent State and local regulation of employee benefit plans.

120 Cong. Rec. S29933 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News, 5177, 5188. Similarly, Representative John Dent, Chairman of the Subcommittee on Labor of the House Committee on Education and Labor, stated:

> I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation.

120 Cong. Rec. H29197 (1974), *quoted in In re Messing*, 114 Bankr. at 548.

This Court has recently confirmed the importance of the uniform regulation of employee benefit plans intended by ERISA:

> To require plan providers to design their programs in an environment of differing State regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10 (1987). Thus, where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations. Id., at 11.

FMC Corp. v. Holliday, ___ U.S. ___, 111 S.Ct. 403, 408 (1990) (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

In another recent opinion, the Court again recognized the breadth of ERISA's preemption clause and reaffirmed that Congress had intended to create a national law surrounding employee benefit plans and to avoid differences in treatment of such plans on a state-by-state basis:

> Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity the Congress sought to implement.

Ingersoll-Rand Co. v. McClendon, ___ U.S. ___, 111 S.Ct. 478, 484 (1990) (holding that ERISA preempted a state cause of action claiming a wrongful discharge to avoid the employee's attainment of pension benefits).

This congressional policy of national uniformity in the regulation of pension benefit plans has been implemented by the courts in all areas except the treatment of such benefits in bankruptcy. In this one area, the reliance

on state spendthrift trust law urged by Petitioner and required by *Goff, Graham* and similar cases has resulted in differing treatment for pension benefits based on factors such as:

- whether the pension plan in question is a defined contribution plan or a defined benefit plan;
- whether the participant is self-employed (or has an ownership interest in the business) or is a rank and file employee;
- whether the participant contributed to the plan or the employer made all contributions to the plan;
- whether the benefits are distributed (or available for distribution) immediately following termination of employment or whether access is restricted until a specified retirement age;
- whether benefits can be paid in a lump sum or only as an annuity or installments; and
- whether the plan permits in-service withdrawals and, if withdrawals are permitted, whether there is an absolute right to withdraw or whether withdrawals are subject to employer or administrative committee approval.

No policy considerations of the Bankruptcy Code justify the disparate results caused by differing state spendthrift trust laws. *Moore,* 907 F.2d at 1480. As the Fourth Circuit properly recognized in its opinion below,

> ERISA requires a plan to have a non-alienation provision, and that provision has been vigorously enforced. No more inquiry need be made to determine whether the trust is controlled by the settlor or the beneficiary, or whether they are the same person. . . .
>
> Hence, this court's holding in *Moore* precludes the fact-based state law inquiry urged by appellees.

Shumate, 943 F.2d at 364 (citations omitted). The congressional policy of a uniform of pension law throughout the nation can be accomplished only by recognizing that Section 541(c)(2) incorporates ERISA.

C. Courts Should Not Create an Incentive for Involuntary Bankruptcies.

Failure to exclude or exempt a debtor's interest in a pension plan from his bankruptcy estate will create a perverse incentive for his creditors to file an involuntary petition in bankruptcy. Prior to filing a petition in bankruptcy, a judgment creditor is clearly unable to garnish or otherwise levy upon a debtor's accrued benefits in a pension plan. However, if the anti-alienation provisions of ERISA do not exclude or exempt benefits from the bankruptcy estate, the same interest will be accessible by the same judgment creditor in a liquidation proceeding.

The Court in *Moore* recognized this anomaly and stated that failure to exclude benefits from the bankruptcy estate under the ERISA anti-alienation provisions "would provide creditors with a means to circumvent this

restriction on their access. We see no evidence that Congress intended to invite a creditor to push a debtor into involuntary bankruptcy in order to reach his ERISA funds." 907 F.2d at 1480.

IV. PENSION PLANS AND THEIR SPONSORS SHOULD NOT HAVE TO CHOOSE BETWEEN DISQUALIFICATION OF THE PLANS AND CONTEMPT CITATIONS.

The pension benefits which are the subject of this case were accrued by Respondent under the Coleman Furniture Corporation Pension Plan (the "CFC Plan"). The CFC Plan has been terminated and the benefits of all participants except Respondent have been distributed. Brief for Petitioner at 7-8. Because the CFC Plan has been terminated, its continuing qualification as tax-exempt is not an issue. However, whether distribution of benefits from a qualified pension plan to a trustee in bankruptcy will cause the plan to lose its tax-exempt status is a major concern for Hallmark and similarly situated plan sponsors.

The Department of the Treasury has been given primary responsibility for the administration and enforcement of ERISA provisions relating to minimum participation, vesting, and funding, including the anti-alienation provisions. ERISA § 3002, 29 U.S.C. § 1202, and Reorganization Plan No. 4 of 1978, *reprinted in* 6 Pens. Coord. (RIA) 84,011. The Internal Revenue Service has adopted the position that payment of a participant's accrued benefits to his bankruptcy trustee will violate ERISA's prohibition against assignment or alienation and

will result in the disqualification of the plan as tax-exempt. The IRS has stated this view in several private letter rulings, *see, e.g.*, PLRs 8131020, 8829009, 8910035, 8951067, 9011037,[10] and has filed *amicus* briefs on this issue. *See, e.g.*, *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1208 (4th Cir. 1985).

The Court in *Moore* recognized the validity of the IRS position:

> [O]ur holding avoids the specter of a bankruptcy trustee disqualifying an entire plan from tax exempt status by seeking turnover of a single bankrupt's interest in the plan. . . . If § 541(c)(2) does not recognize ERISA as "applicable nonbankruptcy law" that operates to exclude pension interests from the bankrupt's estate, then the plan's anti-alienation provisions will be violated and the plan may be subject to disqualification and loss of tax-exempt status. . . . We do not think Congress intended such a result. We can best harmonize ERISA, the Bankruptcy Code, and the Internal Revenue Code by reading "applicable nonbankruptcy law," 11 U.S.C. § 541(c)(2), to include ERISA.

907 F.2d at 1480-81.

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[10] Pursuant to IRC § 6110(j)(3), a private letter ruling may not be relied upon or cited as precedent by any taxpayer other than the taxpayer to whom it is addressed. However, such rulings generally provide a good indication of the IRS's position on a particular issue, especially when, as here, the Service has issued several rulings on the same issue with the same conclusion.

Loss of a pension plan's tax-exempt status would have serious, far-reaching consequences. Disqualification would result in taxation of the investment income to the pension trust. Plan participants would recognize as taxable income in the year of disqualification all amounts in their individual accounts without any corresponding distributions to enable them to satisfy the tax liability (unless the plan is terminated and the benefits distributed). Furthermore, if distributions are made from a nonqualified plan, the benefits would not qualify for rollover to individual retirement accounts nor for favorable tax treatment such as five- or ten-year income averaging. Failure to operate a plan in accordance with the governing documents is also a breach of fiduciary duty by a plan sponsor or administrator who could be liable to make good to the plan and its participants any losses resulting from the breach – such as the tax costs. ERISA §§ 404(a)(1)(D) and 409, 29 U.S.C. §§ 1104(a)(1)(D) and 1109.

Concerned over the possible loss of its tax-exempt status, the Central States Pension Fund in *McLean* refused to pay benefits due to a debtor directly to his bankruptcy trustee and was actually held in contempt by the district court for its refusal. The Fourth Circuit reversed both the pay order and the contempt order based on a conclusion that the pension fund qualified as a spendthrift trust under Illinois law. 762 F.2d at 1206-07. Although the Fourth Circuit has now properly repudiated the spendthrift trust analysis used in *McLean*, the case demonstrates the very real dilemma that has been created by the confused state of the law. Hallmark and other plan sponsors should not be "poised between the Scylla of tax

disqualification and the Charybdis of bankruptcy court contempt, they seek only a safe passage through this statutory strait." *Regan v. Ross*, 691 F.2d at 87.

CONCLUSION

The plain and unambiguous meaning of the statutory language in ERISA and the Bankruptcy Code compels the conclusion that a debtor's pension plan interests are excluded from his bankruptcy estate by Section 541(c)(2) or exempted under Section 522(b)(2)(A). This conclusion is in accord with the dual policies underlying ERISA to safeguard pension benefits and to establish uniform national regulation of pension plans. Therefore, Hallmark urges the Court to affirm the Fourth Circuit's decision below. At the very least, however, the Court should assure plan sponsors and solvent participants that their pension plans will not be disqualified if they are forced to comply with a turnover order.

Respectfully submitted,

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Committee

Plans, Inc.

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In The

Supreme Court of the United States

October Term, 1991

No. 91-913

John R. Patterson, Trustee,
Petitioner,
v.

Joseph B. Shumate, Jr.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENT

The ERISA Industry Committee ("ERIC") and the Association of Private Pension and Welfare Plans, Inc. ("APPWP"), hereby move, pursuant to Rule 37.4, for leave to file the attached brief *amici curiae* in support of Respondent's position that Section 541(c)(2) of the Bankruptcy Code excludes from a debtor's estate the assets of a pension trust governed by the anti-alienation provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1056(d)(1). While Respondent has consented to the filing of this brief, Petitioner has declined to consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

ERIC and APPWP are non-profit organizations that together represent approximately 300 major corporations and

others doing business in a wide variety of industries. Lists of ERIC's and of APPWP's members are set forth in the Appendix to the accompanying brief. ERIC's and APPWP's membership consists of a broad cross-section of major firms that maintain both defined benefit and defined contribution pension plans that are governed by ERISA and are qualified as tax exempt trusts under 26 U.S.C. §§ 401(a) and 501(a). Each of the plans contains the anti-alienation provisions required by 29 U.S.C. § 1056(d)(1). All of ERIC's members and most of APPWP's members do business in more than one state, and some members maintain pension plans that provide benefits for employees in all fifty states. Tens of millions of participants and beneficiaries are covered by ERISA-governed pension plans sponsored by ERIC's and APPWP's members.

This case poses a singularly important issue of statutory construction that has the potential for nationwide effects far beyond the relatively small sum at issue between the parties. Ultimately at stake in this case are the two overarching purposes of ERISA: assurance that pension benefits promised to employees actually will be available to them when they retire, *see Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 375 (1980), and Congress's intent that "pension plan regulation [be] exclusively a federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). ERIC's and APPWP's interest in seeing these purposes fulfilled and in other important issues of benefit plan administration has led them to appear as *amicus curiae* in earlier cases in this Court.[1]

[1] ERIC appeared as *amicus curiae* in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); and *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979). APPWP appeared as *amicus curiae* in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158 (1989).

ERIC and APPWP believe that as *amici curiae* in this case, they can advance arguments relevant to the merits of this case that otherwise will not be advanced by the parties. While the parties no doubt will zealously present their positions on the issues, in litigation between a bankruptcy trustee and an individual debtor, where the amount in issue is comparatively small, the parties' resources to explore the many issues involved in construing Section 541(c)(2) of the Bankruptcy Code understandably are limited. Because the Court's ruling in this case could have a far greater effect on ERIC's and APPWP's members and their employees than it will on the parties, ERIC and APPWP have a greater incentive than do the parties to address these issues in depth. For this reason, ERIC and APPWP believe that the analysis of the statutory language, legislative history and rules of statutory construction presented in Part I of the attached brief is more thorough than the analysis presented by Petitioner and the analysis likely to be presented by Respondent.

Furthermore, ERIC and APPWP bring to this case the perspective of major employers that sponsor large plans with participants and beneficiaries in different states — a perspective broader than that of the parties. The pension plans sponsored by ERIC's and APPWP's members, unlike the plan at issue here, have many thousands or tens of thousands of participants and are not subject to the unilateral control of any one employee-stockholder. Furthermore, most of the pension plans sponsored by ERIC's and APPWP's members operate in more than one state, and ERIC and APPWP therefore are uniquely sensitive to the potentially far-reaching changes in plan administration and employee retirement security that could occur if, as a result of this case, state law becomes the only basis for excluding plan assets from individual bankruptcy estates. For those reasons, ERIC and APPWP believe that the arguments presented in Part II of the attached brief will not be raised by the parties, and will assist the

Court in evaluating the potential impact that adopting Petitioner's reading of Section 541(c)(2) might have on plans sponsored by major employers.

Respectfully submitted,

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March 31, 1992

QUESTION PRESENTED

This brief for The ERISA Industry Committee and the Association of Private Pension and Welfare Plans, Inc., as *amici curiae* is limited to the first question presented by the Petition for Writ of Certiorari herein: whether ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), is an "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), or whether that phrase is limited to state law principles governing spendthrift trusts?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

No. 91-913

JOHN R. PATTERSON, TRUSTEE,
Petitioner,
v.

JOSEPH B. SHUMATE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC. AS *AMICI CURIAE* SUPPORTING RESPONDENT

This brief is submitted on behalf of The ERISA Industry Committee ("ERIC") and the Association of Private Pension and Welfare Plans, Inc. ("APPWP"), as *amici curiae* (collectively, "*amici*") supporting Respondent.

INTEREST OF *AMICI CURIAE*

The interest of ERIC and APPWP is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

The question of statutory construction posed in this case will affect the retirement income security of millions of Americans, and could result in substantial changes in the administration of pension plans, both large and small, nationwide. Section 541(c)(2) of the Bankruptcy Code makes enforceable in a case under Title 11 "[a] restriction on the

transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ." The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832, as amended, codified principally at 29 U.S.C. §§ 1001 *et seq.*, requires that each pension plan shall provide that benefits provided under the plan "may not be assigned or alienated." ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988).[1] The right of a participant to receive benefits from an ERISA-governed plan is protected from the claims of creditors outside bankruptcy. *See Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990). The question posed in this case is whether that protection is also available in bankruptcy.

In this case and in its earlier decision, *Anderson* v. *Raine* (*In re Moore*), 907 F.2d 1476, 1480-81 (4th Cir. 1990), the Fourth Circuit held that ERISA's anti-alienation provision is an "applicable nonbankruptcy law" within the meaning of Section 541(c)(2), and therefore that a debtor's interest in an ERISA-governed plan is not an asset of the bankruptcy estate. *Shumate* v. *Patterson*, 943 F.2d 362, 365 (4th Cir. 1991).

[1] ERISA defines a "pension plan" as "any plan, fund or program which . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan." 29 U.S.C. § 1002(2)(A) (1988). Pension plans that meet the qualification requirements of the Internal Revenue Code and their participants are accorded advantageous tax treatment. *See generally* I.R.C. §§ 401(a), 402(a), 404(a), & 501(a) (1988).

One of the qualification requirements is that a plan must provide that "benefits provided under the plan may not be assigned or alienated," *i.e.*, a provision that mirrors the requirements of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988). *See* I.R.C. § 401(a)(13) (1988).

Three other courts also have adopted this view.[2] Despite the breadth of the term "applicable nonbankruptcy law," five Circuits have ruled that Section 541(c)(2) excludes from the debtor's estate only assets excludable under state spendthrift trust principles.[3] The limitation of Section 541(c)(2)'s scope to state spendthrift trust law is insupportable as a matter of statutory construction, and jeopardizes fundamental national policies regarding retirement income security.

I.

The phrase "applicable nonbankruptcy law" is not defined in the Bankruptcy Code, and therefore must be interpreted according to the ordinary meaning of its terms. That meaning, as established by dictionary definitions, judicial usage, and the meaning Congress attached to the phrase elsewhere in Title 11 and in Title 28, clearly includes federal statutory law such as ERISA. The ordinary meaning of the term "applicable nonbankruptcy law" cannot be limited to state law principles governing spendthrift trusts.

Section 541(c)(2) is not a "rare and exceptional" instance in which the Court need go beyond the plain meaning of the

[2] *See Gladwell* v. *Harline* (*In re Harline*), 950 F.2d 669 (10th Cir. 1991); *Velis* v. *Kardanis*, 949 F.2d 78 (3d Cir. 1991); *and Forbes* v. *Lucas* (*In re Lucas*), 924 F.2d 597 (6th Cir. 1991), *cert. denied sub nom. Forbes* v. *Holiday Corp. Savings and Retirement Plan*, 111 S. Ct. 2275 (1991).

[3] The principal basis for this interpretation is that the pertinent House and Senate Judiciary Committee Reports do not refer to any application of Section 541(c)(2) other than preserving the exclusion under prior law of spendthrift trusts. *See Regan* v. *Ross*, 691 F.2d 81, 84-85 (2d Cir. 1982); *Lichstrahl* v. *Bankers Trust* (*In re Lichstrahl*), 750 F.2d 1488, 1490 (11th Cir. 1985); *Daniel* v. *Security Pacific Nat'l Bank* (*In re Daniel*), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Samore* v. *Graham* (*In re Graham*), 726 F.2d 1268, 1271-72 (8th Cir. 1984); *and Goff* v. *Taylor* (*In re Goff*), 706 F.2d 574, 581-82 (5th Cir. 1983).

statutory terms. This Court is not required to construe the words "applicable nonbankruptcy law" to mean less than they plainly do simply because the House and Senate Judiciary Committee Reports accompanying the Bankruptcy Reform Act do not state that protecting the assets of ERISA-governed plans was an additional purpose of Section 541(c)(2). Statutes often have effects that are not specifically mentioned in their legislative histories.

Even if the meaning of the phrase "applicable nonbankruptcy law" in Section 541(c)(2) were tethered to the legislative history, that history does not show that the *only* purpose of Section 541(c)(2) was to protect the assets of spendthrift trusts. The rationale for Congress's protection of spendthrift trusts applies equally well to the protection of ERISA-governed pension plans.

Interpreting Section 541(c)(2) to apply to the assets of ERISA-governed plans does not render Section 522(d)(10)(E) of the Bankruptcy Code superfluous. The latter section excludes from a debtor's estate only certain *distributions* received from pension plans, whereas Section 541(c)(2) excludes the corpus of ERISA-governed pension trusts. Section 522(d)(10)(E) cannot be construed as an exemption for *undistributed* plan assets.

II.

Interpreting Section 541(c)(2) to apply only to spendthrift trusts would violate two fundamental policies regarding retirement income security that this Court repeatedly has endorsed: enforcement of Congress's desire that retirement income and savings benefits promised to American workers will in fact be available to them upon their retirement, and enforcement of Congress's desire that pension plan regulation be governed exclusively by federal law.

If the assets of ERISA-governed trusts are not excluded from debtors' estates, then some plan participants will lose

their pension funds, perhaps at an age when they cannot hope ever again to build a retirement nest egg. That result is incompatible with ERISA's purposes of ensuring that promised pension benefits will in fact be available, and that employees will not look principally to public support when they reach retirement age or are no longer able to work. It is difficult to believe that in the Bankruptcy Reform Act, Congress would abrogate fundamental premises of national retirement income policy, much less that it would do so *sub silentio* in House and Senate Judiciary Committee Reports.

If Sections 541(c)(2) is interpreted to apply only to state-law spendthrift trusts, then state law will govern whether their assets are immune from the claims of bankruptcy creditors — a result clearly inconsistent with this Court's adherence to the principle that employee benefit plan regulation be governed exclusively by federal law. Deviation from this principle will expose plan sponsors and fiduciaries to unnecessary administrative costs, and potential liability. If only state spendthrift trust principles can shield undistributed plan assets from bankruptcy claims, plan fiduciaries may be faced with claims of liability if they fail to restructure their plans wherever possible as spendthrift trusts. Plan fiduciaries may be forced repeatedly to defend the state law status of their plans before many bankruptcy courts nationwide. Most significantly, if the Internal Revenue Service determines that a turnover of plan assets to a bankruptcy court is a prohibited distribution under ERISA, and disqualifies the plan from favorable federal income tax treatment, *all* the participants in the plan will lose the tax benefits on which their retirement income largely depends. Thus, the bankruptcy of one employee could jeopardize the retirement income of thousands of his or her coworkers.

These radical departures from national retirement income policy will provide a windfall to creditors, permitting them to reach assets in bankruptcy that they cannot look to outside

bankruptcy. The inclusion of pension assets in the estates of all debtors cannot be justified as a means of preventing the small minority of plan participants who can control the amount of contributions to their plans from sheltering assets. A less drastic remedy aimed only at such practices is available. Thus, there is no reason to deny Section 541(c)(2) its full meaning.

ARGUMENT

I. SECTION 541(c)(2) OF THE BANKRUPTCY CODE MUST BE CONSTRUED TO EXCLUDE FROM THE BANKRUPTCY ESTATE THE ASSETS OF AN ERISA-GOVERNED PLAN.

A. The Statutory Language On Its Face Excludes From the Bankruptcy Estate the Assets of Any Trust the Transfer of a Beneficial Interest in Which is Restricted by ERISA.

In cases of statutory construction, this Court begins with the language of the statute. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987); *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 722 (1982); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). *See also Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 630 (1983). In construing the statutory language, "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). *See also United States* v. *James*, 478 U.S. 597, 604 (1986). Unless the words or phrases to be construed are defined terms, they must be

interpreted "as taking their ordinary, contemporary, common meaning." *Diamond, supra*, 447 U.S. at 308 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). "[I]f the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1980) (quoting *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291-92 (1988)); *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 623 (1991).[4]

The statutory language in issue here — "applicable nonbankruptcy law" — is neither a defined term nor composed of defined terms. The ordinary meaning of the words "applicable nonbankruptcy law," as illuminated by dictionary definitions and other evidence of "ordinary, contemporary and common" usage, undeniably encompasses federal statutory law except for Title 11 itself. Furthermore, an examination of the judicial and legislative use of the phrase at or near the time the Bankruptcy Reform Act was passed confirms that "applicable nonbankruptcy law" was understood to include federal statutory law, and suggests that "applicable nonbankruptcy law" was used in the Act to refer to any rule of decision that would govern a given controversy if that controversy arose outside the context of Title 11.[5]

1. Legal and general dictionaries establish that the ordinary meaning of the words "applicable nonbankruptcy

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[4] *See also Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous").

[5] *Cf., e.g., Liscinski* v. *Mosley* (*In re Mosley*), 42 B.R. 181, 191 (Bankr. D.N.J. 1984) (the phrase "applicable nonbankruptcy law" in Section 541(c)(2) "refer[s] to all law that might normally apply outside of bankruptcy proceedings").

law" extends at least as far as federal statutory law, other than Title 11 itself.[6] The ordinary meaning of the word "law" is broad enough to encompass federal statutory law, and the modifiers "applicable" and "nonbankruptcy" certainly do not limit the word "law" to exclude ERISA.[7] "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force . . . 'law' generally contemplates both statutory and case law . . . ." *Black's Law Dictionary* at 884 (citations omitted).[8] As recently as last year, this Court explained that "nonbankruptcy law that creates substantive claims . . . include[s] . . . claims that have their source in substantive federal law . . . ." *Grogan* v. *Garner*, 111 S. Ct. 654, 658 n.9 (1991). Thus, "nonbankruptcy law" clearly includes federal statutes such as ERISA.

2. The dictionary definitions that establish the ordinary meaning of the words "applicable nonbankruptcy law" are confirmed by judicial usage roughly contemporaneous with

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[6] This Court often relies on legal and general dictionaries to ascertain the ordinary meaning of statutory terms. *See, e.g.*, *Holywell Corp.* v. *Smith*, 60 U.S.L.W. 4163, 4165 (February 25, 1992); *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2179 & n.7 (1991); *Dennis* v. *Higgins*, 111 S. Ct. 856, 871 (1991); *James*, *supra*, 478 U.S. at 597 n.6. Although dictionary definitions are not sufficient to establish the precise meaning of the statutory phrase "applicable nonbankruptcy law," they do establish that the ordinary meaning of those words cannot exclude ERISA.

[7] "Applicable" is defined to mean "[f]it, suitable, pertinent, related to or appropriate; capable of being applied." *Black's Law Dictionary* 98 (6th ed. 1990). The primary definition of "applicable" is "capable of being applied: having relevance." *Webster's Third New International Dictionary of the English Language, Unabridged* at 105 (1976). The adjective "applicable," then, conveys no limitation on the category or source of the legal rules referred to by the noun "law."

[8] *See also Webster's Third International* at 1279; *cf. Norfolk & Western Ry. Co.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) ("By itself, the phrase 'all other law' indicates no limitation").

the adoption of the Bankruptcy Reform Act of 1978, and by legislative usage of that phrase both in Title 11 itself and in Title 28. Given judicial and legislative use of the words "applicable nonbankruptcy law" to include federal statutory law, any suggestion that the phrase as used in Section 541(c)(2) is ambiguous is insupportable. *West Virginia University Hospital, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991).[9]

a. Both shortly before and after the passage of the Bankruptcy Reform Act, courts used the phrase "nonbankruptcy law" in contexts where it clearly included federal law. In 1969, the Third Circuit stated that under 11 U.S.C. § 107(c)(1)(B) (1964), "the basic test of a lien's validity [is] whether under state or federal nonbankruptcy law the lien was perfected against bona fide purchasers." *In re Century Vault Co.*, 416 F.2d 1035, 1038 (1969). In *Securities and Exchange Commission* v. *North American Planning Corporation*, Fed. Sec. L. Rep. [CCH] ¶ 95,326, at 98,644 (E.D. Pa. 1975), the court observed that a trustee's rights to avoid transfers under § 70(e)(1) of the Bankruptcy Act, then codified at 11 U.S.C. § 110(e)(1), "depend on nonbankruptcy law, typically state law."

Similarly, in the years after 1978, courts used the words "applicable nonbankruptcy law" to include federal law where federal law supplied the pertinent rule of decision in a proceeding under Title 11. In *United States* v. *Darnell* (*In re Darnell*), 834 F.2d 1263, 1266, 1269 (6th Cir. 1987), the

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[9] While it is sufficient for an affirmance in this case merely to show that the words "applicable nonbankruptcy law" do not exclude ERISA, judicial and legislative use of the phrase "applicable nonbankruptcy law" suggests that the precise meaning of that phrase in Title 11 is "any law, state or federal, that would be applicable to a given issue if that issue arose outside the context of a case under Title 11." Under this definition § 541(c)(2)'s reference to "applicable nonbankruptcy law" clearly includes ERISA.

"applicable nonbankruptcy law" governing the relative priority in bankruptcy of state and federal tax liens was held to be the "first in time, first in right" principle enunciated in *United States* v. *New Britain*, 347 U.S. 81 (1954), because "the competing liens involve a federal tax, [and therefore] federal law controls." Similarly, in *Pearlstein* v. *United States Small Business Administration*, 719 F.2d 1169, 1176 (D.C. Cir. 1983), it was held that the comparative priority of a Small Business Administration lien and a District of Columbia sales tax lien was to be determined by "pertinent nonbankruptcy lien law," and that "[s]ince the nontax lien is that of the United States . . . federal law governs . . . ." *Accord*, *Bavely* v. *Internal Revenue Service* (*In re Terwilliger's Catering Plus, Inc.*), 911 F.2d 1168, 1176 (6th Cir. 1990) ("Where one of the competing liens is a federal tax lien, the applicable bankruptcy law that determines the priority between the liens is federal law"), *cert. denied sub nom. Ohio Department of Taxation* v. *Internal Revenue Service*, 111 S. Ct. 2815 (1991).

To be sure, the case law sometimes uses "nonbankruptcy law" to refer to state law.[10] However, the equation of nonbankruptcy law with state law merely acknowledges that, in most instances, state law creates and governs the property

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[10] In *Caruso Enterprises, Inc.* v. *Bumb* (*In re Wonderbowl, Inc.*), 456 F.2d 954, 956 (9th Cir. 1972), for example, the court held that a bankruptcy court should decline to adjudicate a matter better left to plenary litigation "where important questions turning on nonbankruptcy law are involved," citing, *inter alia*, *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940), a case in which this Court held that bankruptcy courts should "consent to submission to state courts of particular controversies involving unsettled questions of state property law . . . ." The Ninth Circuit was more blunt in *Vanderpark Properties, Inc.* v. *Buchbinder* (*In re Windmill Farms, Inc.*), 841 F.2d 1467, 1469 (1988): "The phrase 'applicable nonbankruptcy law' [in 11 U.S.C. § 365(c)(3)] means applicable state law."

interests at stake in a Title 11 case.[11] "State law" is sometimes used as a short-hand expression for all law, state and federal, that determines an issue in question. Indeed, only last year this Court held that "The validity of a creditor's claim [against a bankruptcy estate] is determined by rules of state law," but explained:

> We use the term state law expansively herein to refer to all nonbankruptcy law that creates substantive claims. We thus mean to include in this term claims that have their source in substantive federal law, such as federal securities law or other federal antifraud laws.

Grogan v. *Garner*, *supra*, 111 S. Ct. at 657-58 and n.9.

b. Congress's use of the term "applicable nonbankruptcy law" establishes that it understood that phrase to include federal law. In fact, it appears that Congress used the phrase "applicable nonbankruptcy law" to refer to any body of law, state or federal, that would supply the rule of decision pertinent to a given issue if the issue arose outside the context of bankruptcy.

I. The best evidence of Congress's understanding of the phrase "applicable nonbankruptcy law" is the use to which that phrase was put elsewhere in portions of Title 11 enacted by the Bankruptcy Reform Act of 1978.[12] In addition to Section 541, nine such sections or subsections use the phrase "applicable nonbankruptcy law": 11 U.S.C. §§ 363(f)(1), 365(h)(1), 510, 522(b)(2)(B), 524(c), 552(b), 1125(d), 1126(b)(1), and 1142(a). Three of these sections on their face compel the conclusion that Congress understood "applicable

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[11] *See, e.g.*, *Pearlstein*, *supra*, 719 F.2d at 1176, *and Atlantic Richfield Co.* v. *Herbert* (*In re Herbert*), 806 F.2d 889, 892 (9th Cir. 1986).

[12] *See Morrison-Knudsen*, *supra*, 461 U.S. at 633 ("[A] word is presumed to have the same meaning in all subsections of the same statute").

nonbankruptcy law" to include federal statutory law. The phrase "applicable nonbankruptcy law" in Sections 1125(d) and 1126(b)(1), which concern disclosure in connection with acceptance or rejection of reorganization plans, clearly includes federal statutes regulating securities.[13] Similarly, Section 363(f)(1) permits the sale of estate property free and clear of the interest of a third party if such a sale is permitted under "applicable nonbankruptcy law," a phrase that includes federal law.[14]

II. The Bankruptcy Improvements and Federal Judgeship Act of 1984 added five additional references in Title 11 to "applicable nonbankruptcy law." 11 U.S.C.A. §§ 101(56)[2d], 108(a)-(c), 927, 943, and 1123.[15] Once again, several of the references to "applicable nonbankruptcy law" clearly include federal law. For example, Section 108(a) extends unexpired statutes of limitations fixed, *inter alia*, by "applicable nonbankruptcy law," including statutes of

[13] *See Public Service Co. of New Hampshire* v. *Consolidated Utilities and Communications, Inc.*, 846 F.2d 803, 808 (1st Cir. 1988) and *see also* the House Judiciary Committee Report accompanying H.R. 8200, which became Pub. L. No. 95-598, H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) at 409-10.

[14] *See* Pub. L. No. 100-710, Title I, § 106(b)(2) and 102(c), 102 Stat. 4746, 4752 (Nov. 23, 1988), repealing and replacing the Ship Mortgage Act of 1920, 46 U.S.C. § 911 *et seq.*, which governs foreclosure of certain maritime liens and specifies the conditions under which a vessel of the United States can be sold free from pre-existing claims in certain foreclosure sales.

[15] Section 102(a) of the Act also added Section 1411 of Title 28 of the United States Code, which provides in relevant part that except as ordered by a district court in an involuntary case under Title 11, neither Title 28 nor Title 11 "affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." The right to a trial by jury in personal injury and wrongful death claims may be conferred by federal statutory law. *See, e.g.*, the Jones Act, Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, codified at 46 U.S.C.A. app. § 688 (1988).

limitations arising under the Federal Tort Claims Act. *Eagle-Picher Industries, Inc.* v. *United States*, 937 F.2d 625, 639-40 (D.C. Cir. 1991). Section 108(b) extends unexpired periods arising under "applicable nonbankruptcy law" for, *inter alia*, filing claims under the Internal Revenue Code. *Brickley* v. *Internal Revenue Service (In re Brickley)*, 70 B.R. 113, 115-16 (Bankr. App. 9th Cir. 1986) (per curiam). Section 108(c) extends against the debtor certain statutes of limitations arising under "applicable nonbankruptcy law," including the Racketeer Influenced and Corrupt Organizations Act. *Eisenberg* v. *Feiner (In re Ahead by a Length, Inc.)*, 100 B.R. 157, 162-63 (Bankr. S.D.N.Y. 1989).

III. Pub. L. No. 100-506, 102 Stat. 2538 (Oct. 18, 1988), added subsection 365(n) to the Bankruptcy Code to protect the rights "under applicable nonbankruptcy law" of licensees of intellectual property. As used in Section 365(n)(1)(B), the phrase "applicable nonbankruptcy law" refers to, *inter alia*, federal copyright laws. *Gladwell*, 950 F.2d at 674 (dictum); *Velis, supra*, 949 F.2d at 81 (dictum).[16]

IV. Petitioner is correct to point out that the phrase "applicable nonbankruptcy law" is sometimes used in Title 11 in circumstances where the only law to be applied is state law. *See* Pet. Br. 35, citing Section 522(b)(2)(B), pertaining to tenancies by the entireties. But the phrase "applicable nonbankruptcy law" refers to state law in such contexts *not* because the meanings of the words "applicable nonbankruptcy law" have changed, but because they are used in contexts

[16] The Senate Judiciary Committee Report on S. 1626, which became Pub. L. No. 100-506, S. Rep. No. 505, 100th Cong., 2d Sess. (Sept. 14, 1988), *reprinted in* 1988 U.S. Code Cong. & Adm. News 3200, 3204-05, uses the phrase "applicable nonbankruptcy law" as a synonym for "federal or state law, statutory or common law."

where, as it happens, only state law can supply the pertinent rule of decision.[17]

3. This Court has indicated that there can be "rare and exceptional" circumstances under which the Court's inquiry will not stop at the unambiguous meaning of the statutory text.[18] In particular, the Court sometimes has suggested that where there has been a "'clearly expressed legislative intent to the contrary'" of the ordinary meaning of the words employed, the ordinary meaning may not control. *Escondido Mutual Water Co., supra*, 466 U.S. at 772, quoting *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983), quoting *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[19] This is not an appropriate case for the Court to invoke the "rare and exceptional" circumstances exception to entertain interpretations of Section 541(c)(2) that deviate from its plain meaning. To adopt a reading of the Bankruptcy Code that runs counter to the clear meaning of the statutory text requires meeting an "exceptionally heavy" burden. *See Union Bank* v. *Wolas*, 112 S. Ct. 527, 530 (1991) (citing *United States* v. *Ron Pair*

[17] Even the Fifth Circuit in *Goff*, 706 F.2d at 586 n.33, disclaimed reliance on Section 522(b)(2), concluding that the reasoning in opinions interpreting the words "applicable nonbankruptcy law" in Section 522(b) to refer only to state law were "not wholly applicable to the case at hand because the only law defining such property interests is state law." *Id.*

[18] *See, e.g., Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2636 (1991); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991) (citing *Burlington Northern Ry. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987)); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

[19] *See also United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Prods. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) ("If the statutory language is unambiguous," then "in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'").

Enterprises, Inc., 489 U.S. 235, 241-42 (1989)).[20] That burden has not been met here, either in the suggestion that the legislative history requires a narrow reading of Section 541(c)(2), or in the suggestion that Section 522(d)(10)(E) of the Bankruptcy Code would be rendered superfluous by the literal meaning of Section 541(c)(2).[21]

B. The Legislative History of Section 541(c)(2) Does Not Warrant Narrowing Its Scope.

The essence of the primary interpretive argument adopted by the Second, Fifth, Eighth, Ninth and Eleventh Circuits, and by Petitioner, is that the general category created by the literal interpretation of the words "applicable nonbankruptcy law" should be limited to the specific class of laws referred to in the legislative history. *Regan* v. *Ross*, *supra*, 691 F.2d at 85; *Goff*, *supra*, 706 F.2d at 581-82; *Graham*, *supra*, 726 F.2d at 1271-72; *Lichstrahl*, *supra*, 750 F.2d at 1490; *Daniel*, *supra*, 771 F.2d at 1359-60 n.17. Pet. Br. at 28, 38-39. This argument cannot be countenanced because "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal*

[20] *See also Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) (Where statutory language is "plain and precise," one who would interpret a statute contrary to its literal meaning "faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act").

[21] Following the lead set by *Goff*, *supra*, 706 F.2d at 586-87, Petitioner also urges that ERISA § 514(d), 29 U.S.C. § 1144(d), requires that Section 541(c) be interpreted not to include ERISA among "applicable nonbankruptcy law[s]." Pet. Br. 15-16. This argument is based on a misconception. ERISA § 514(d) provides only that, subject to certain exceptions not germane to the issue here, nothing in Subchapter I of ERISA will be construed "to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . ." It is not suggested that Subchapter I of ERISA should be construed to alter or impair any provision of the Bankruptcy Code. Only the construction of Section 541(c)(2) of the Bankruptcy Code is in issue in this case.

Group v. *Sebben*, 109 S. Ct. 414, 420-21 (1988). Furthermore, a careful reading of the legislative history does not support the limitation for which Petitioner argues.

1. This Court has made clear that legislative history may not be used to narrow the scope of a statutory term. *West Virginia University Hospitals., Inc., supra*, 111 S. Ct. at 1147 ("Where [the statutory text] contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process"). In particular, "[t]his Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal, supra*, 111 S. Ct. at 467.[22] Even if Congress did not foresee that the phrase "applicable nonbankruptcy law" would encompass more than merely state law principles governing spendthrift trusts, the statutory language should be given its full effect. *See Union Bank* v. *Wolas, supra*, 112 S. Ct. at 531 (citing *Toibb* v. *Radloff*, 111 S. Ct. 2197 (1991)).

Furthermore, in *Pittston Coal Group, supra*, 488 U.S. at 115 (1988), this Court rejected categorically an argument of the precise form adopted by the *Goff* line of cases. There, the Secretary of Labor argued that only medical criteria came within a statutory mandate in Section 2(c) of the Black Lung Benefits Reform Act of 1977 ("BLBRA")[23] to establish interim criteria for certain categories of disability claims that

[22] *See also Davis* v. *Michigan Dept. of the Treasury*, 489 U.S. 803, 808 n.3 (1989) ("The language of the statute leaves no room for doubt . . . so the State's attempt to establish a minor inconsistency with the legislative history need not detain us. Legislative history is irrelevant to the interpretation of an unambiguous statute").

[23] Pub. L. No. 95-239, 92 Stat. 95, codified as amended at 30 U.S.C. § 902(f).

were no more restrictive than those in force on a specified date before the passage of the BLBRA, because the legislative history disclosed an intention to preserve only the prior medical criteria. *Id.* at 115. By comparison with the legislative history relied upon in *Goff*, there were numerous references in the legislative history of the BLBRA lending considerable support to the Secretary's argument in *Pittston*. *See id.* at 134-45 (Stevens, J., dissenting). Nonetheless, this Court flatly rejected the notion that a general statutory term can be narrowed by legislative history that referred to a more limited and specific purpose.

2. The legislative history of § 541(c)(2) on which *Goff* and its progeny so heavily rely does not justify constricting the meaning of the phrase "applicable nonbankruptcy law." At most, the House Judiciary Committee Report merely demonstrates that state spendthrift trust principles are one example of "applicable nonbankruptcy law" that is enforceable under the Bankruptcy Code. H. Rep. No. 95-595, *supra*, 369. *See also* S. Rep. No. 989, 95th Cong., 2d Sess. at 82. Nothing in the report suggests that § 541(c)(2)'s scope is *limited* to state spendthrift trusts.[24] Indeed, the rationale suggested by the House Report for excluding from the estate the debtor's interest in a spendthrift trust is equally applicable, *mutatis mutandis*, to excluding ERISA-governed pension plans. After explaining that the bill would continue to exclude spendthrift trusts from the debtor's estate, the Report states, "The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust." H.R. Rep. No. 95-595 at 176.

[24] *Cf. Perrin, supra*, 444 U.S. at 45 ("The record of the hearings and floor debates [on the Travel Act, 18 U.S.C. § 1952] discloses that Congress made no attempt to define the statutory term 'bribery,' but relied on the accepted contemporary meaning. There are ample references to the bribery of state and local officials, but there is no indication that Congress intended to so limit its meaning").

Both the legitimate expectations of plan sponsors that their employees will be provided for, and the legitimate expectation of Congress that pension benefits promised to employees actually will be paid, are at least as deserving of consideration as the desire of private settlors to pass on accumulated wealth to heirs who are (or are feared to be) wastrels.

C. Reading Section 541(c)(2) to Apply to ERISA-Governed Plans Does Not Render Section 522(d)(10)(E) Superfluous.

Petitioner urges that interpreting Section 541(c)(2) to exclude the assets of ERISA-governed plans will render Section 522(d) (10)(E) of the Bankruptcy Code "an effective nullity," and therefore offend the canon of construction that counsels against construing one portion of an act so as to render another portion superfluous. Pet. Br. 29-30. This argument rests on the misconception that exclusion of pension plan assets from the debtor's estate under Section 541(c)(2) would render Section 522(d)(10)(E) superfluous.

Section 522(d)(10)(E) excludes from the debtor's estate only certain *distributions* received from pension plans, and only in an amount "reasonably necessary for the support of the debtor and any dependent[s]." *See Gladwell*, *supra*, 950 F.2d at 675; *Velis*, *supra*, 949 F.2d at 81. Section 541(c)(2), on the other hand, excludes from the debtor's estate only the undistributed corpus of a pension trust. Section 541(c)(2) requires the enforcement in bankruptcy of restrictions on the transfer of the debtor's beneficial interest only if that interest is "in a trust"; its protection does not extend to pension distributions, which are free of the trust. *Cf.*, *e.g.*, *Minot* v. *Minot*, 319 Mass. 253, 66 N.E.2d 5, 15 (1946). Far from being superfluous, Section 522(d)(10)(E) serves a function separate from that served by Section 541(c)(2). Section 541(c)(2) gives effect to ERISA's policy of ensuring the future availability of pension payments by

protecting the fund that someday will finance those payments. By contrast, Section 522(d)(10)(E) treats current distributions from pension plans not needed for the debtor's support as available to creditors.

Petitioner is simply wrong to suggest the language of Section 522(d)(10)(E) is broad enough to cover a debtor's right to future payments from a pension fund. Pet. Br. 32. Just as the debtor's "interest" in the various kinds of exempt property listed in Section 522(d)(1)-(9) refers only to his or her present possessory interest in such property,[25] so "the debtor's right to receive . . . a payment" under a pension plan referred to in Section 522(d)(10) clearly means only a right to *current* payment. Each item in the list of exemptions should be interpreted to be of the same kind as the others.[26]

The legislative history of Section 522(d) confirms that the pension exemption does not apply to future payments or undistributed pension funds. Section 522(d)'s exemptions were "derived in large part from the Uniform Exemptions Act, promulgated by the Commissioners of Uniform State Laws in August, 1976." H.R. Rep. No. 95-595 at 361. However, Section 522(d)(10)(E) omits language that was contained in Section 6(a) of the Uniform Exemptions Act, the provision governing pensions, that could have been construed to subject pension plan assets (in excess of those needed for

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[25] *Cf. White* v. *Stump*, 266 U.S. 310, 312 (1924) (bankruptcy exemptions to be determined as of the time of filing).

[26] *Cf. Dole* v. *United Steelworkers of America*, 110 S. Ct. 929, 935 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning'") (citation omitted). *But see American Honda Fin. Corp.* v. *Dairyland Ins. Agency (In re Cilek)*, 115 B.R. 974, 978-79 (Bankr. W.D. Wis. 1990) (11 U.S.C. § 522(d)(10)(E) limited by debtor's right to receive payments, not by actual receipt).

support) to creditors' claims.[27] Congress omitted the Uniform Exemption Act's reference to pension plan assets when it drafted Section 522(d)(10)(E), because that section did not concern plan assets, and merely conferred a limited exemption on the right to receive pension payments.[28]

D. The Exclusion from the Debtor's Estate of Assets Held in a Trust Other Than a Spendthrift Trust is Not a Departure From Pre-Code Law.

In several cases, this Court has held that a provision of the Bankruptcy Code will not be interpreted to alter pre-Code law absent clear evidence of congressional intent to accomplish such an alteration. *See Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986); *Kelly* v. *Robinson*, 479 U.S. 36 (1986). Petitioner seizes on these cases, and on the dissent in *Ron Pair Enterprises*, *supra*, 489 U.S. at 252 (O'Connor, J., dissenting), to argue that Section 541(c)(2) cannot be interpreted to apply to any circumstances other than state law spendthrift trusts absent a clear indication of congressional intent to so expand pre-Code law.[29]

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[27] *Compare* 11 U.S.C. § 522(d)(10)(E) (1988) *with* Uniform Exemptions Act § 6, 13 U.L.A. 224 (1986) ("[a]n individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents: . . . (5) *assets held*, payments made, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan . . . .") (emphasis added).

[28] Even Section 6(a) of the Uniform Exemptions Act does not permit levy on all assets of an ERISA-governed plan. *See* Comment 5 to § 6(a).

[29] It is not clear that the approach of *Midlantic* and *Kelly* applies to Section 541(c)(2), since Section 541 represented a new conscious departure from pre-Code law. "Section 541 reflects a new concept concerning property of the estate under the Code. This new concept is the substantial departure under the Code from the extensive reliance of the Bankruptcy Act on nonbankruptcy law, usually state law, to determine what property will come in the estate." 4 *Collier on Bankruptcy* ¶ 541.02[1] (15th ed. 1992).

Even if it were clear that the approach taken by those cases applied, as Petitioner himself notes, under pre-Code law "[whether] property of a debtor [was] subject to the reach of his creditors in bankruptcy depended on whether a particular asset was either in alienable or leviable form." Pet. Br. at 20 (citing *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966)). The assets of an ERISA-governed plan are not in "alienable or leviable form." *See Guidry*, *supra*, 493 U.S. at 371-72.

Amici have been unable to find any opinion written before adoption of the Bankruptcy Reform Act deciding whether the assets of an ERISA-governed trust were excluded from the bankrupt's estate under Section 70 of the Bankruptcy Act, formerly codified at 11 U.S.C. § 110. However, several decisions under the Bankruptcy Act rendered after the enactment of the Bankruptcy Code held that assets in an ERISA-governed plan, which the debtor had no present right to receive, did not become assets of the estate.[30] Similarly, in *Tennessee Valley Authority* v. *Kinzer*, 142 F.2d 833 (6th Cir. 1944), the Sixth Circuit held that an employee's contributions to a plan (which contained restrictions imposed under federal law prohibiting transfer, assignment or encumbrance of the plan assets) were not assets of the bankruptcy estate, notwithstanding that those contributions would have been reachable by creditors under state spendthrift trust principles, because the employee had no immediate right to receive payment from the fund on the date he was adjudicated

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[30] *See Turpin* v. *Wente (Matter of Turpin)*, 644 F.2d 472, 474 (5th Cir. 1981); *Mason* v. *Eastman Kodak Co.* (*Matter of Parker*), 473 F. Supp. 746, 751 (W.D.N.Y. 1979) (employee savings plan assets payable upon termination, but employee had power, as limited by the Internal Revenue Code, to borrow against the fund and to withdraw funds in the event of hardship). *But see Dunlavey* v. *Newnum (In re Newnum)*, 2 B.R. 500 (Bankr. D. Ariz. 1980).

Of course, *amici* do not suggest that Section 541(c)(2) represents a codification of the results in *Turpin* and *Parker*. *Cf. Midlantic*, *supra*, 474 U.S. at 498. However, *Turpin* and *Parker* illustrate principles of pre-Code law that are consistent with Respondent's interpretation of Section 541(c)(2).

a bankrupt.[31] The current exclusion of the assets of ERISA-governed plans can be viewed as a continuation (as well as an amplification) of these cases.

II. THE NARROW INTERPRETATION OF SECTION 541(c)(2) ADVOCATED BY THE PETITIONER CONFLICTS WITH FUNDAMENTAL NATIONAL RETIREMENT INCOME POLICIES.

An interpretation of Section 541(c)(2) that limits its operation to only those trusts qualifying as spendthrift trusts under state law would do violence not only to the ordinary language Congress used and the standards for statutory construction this Court has delineated, but also to the two fundamental bases of national retirement income policy that inform ERISA: that promised retirement benefits will be paid, and that all employee benefit plans, including pension plans,[32] will be regulated exclusively by federal law. The consequences of weakening those principles could be far-reaching, both for plan participants and plan fiduciaries. In view of those consequences, it is difficult to believe that Congress intended the Bankruptcy Code to expose plan participants to loss of their pension funds under state law, especially when to do so merely confers a windfall on

[31] In *Standard Oil Co.* v. *Blane (In re Baxter)*, 104 F.2d 318 (1939), the Sixth Circuit reached the same result on the same rationale in the case of a private pension plan.

[32] ERISA divides employee benefit plans into pension plans and "welfare plan[s]," which provide health, accident, vacation and other forms of non-pension benefits. *See* 29 U.S.C. §§ 1002(1)-(3)(1988). *Cf.* ERISA § 3(34)-(35), 29 U.S.C. § 1002(34)-(35), further dividing pension plans into "individual account" or "defined contribution" plans (in which benefits are determined solely by contributions to each participant's account and allocable income and expenses, gains and losses, and forfeitures from other individual accounts), and "defined benefit" plans (in which pay-out generally is made in accordance with a formula prescribed by the terms of the plan).

bankruptcy creditors by giving them access to funds otherwise unavailable to them.

1. If § 541(c)(2) is interpreted to apply only to spendthrift trusts, and § 522(b)(2) is not interpreted to exempt assets of an ERISA-governed trust, then inevitably some American workers — those unlucky enough to be participants in plans that do not satisfy state-law spendthrift trust principles — will lose their pensions, and for some this loss may come when age or disability will prevent their ever again building up a retirement fund.[33] Yet ERISA was enacted precisely to prevent the "great personal tragedy" involved in the loss of retirement funds. *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting Sen. Bentsen, 3 Leg. Hist. 4793).[34] ERISA was designed in part to ensure

[33] In large measure, the impetus for adopting ERISA stemmed from the often horrifying accounts of middle-aged and elderly employees who suddenly found themselves without the pension benefits on which they had been counting. *See, e.g.*, 3 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. (Comm. Print 1976)("Leg. Hist."), 4811-12 (remarks of Sen. Ribicoff), 3 Leg. Hist. 4698 (remarks of Rep. Annunzio) and *see esp.* 2 Leg. Hist. 1865-71 (remarks of Sen. Kennedy).

[34] *See also Nachman, supra*, 446 U.S. at 375 (one purpose of ERISA is to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement — and if he has filled whatever conditions are required to obtain a vested benefit — that he actually will receive it"). The protections of ERISA are equally important for defined contribution plans. ERISA was enacted because Congress saw a need for "responsible and comprehensive pension reform . . . to ensure that *every* American working person covered by a pension plan can depend upon that plan to pay benefits to which that person is entitled after retirement." 3 Leg. Hist. 3583 (remarks of Rep. Price) (emphasis added). ERISA's anti-alienation provision and the congressional statement of purposes contained in 29 U.S.C. § 1001 do not distinguish between defined contribution and defined benefit plans.

that upon retirement workers would not become dependent upon public support.[35]

In particular, the purpose of ERISA's anti-alienation provision is to "further ensure that the employee's accrued benefits are actually available for retirement purposes . . . ." H.R. Rep. No. 807, 93rd Cong., 2d Sess. 68 (1974). The anti-alienation provision was designed not only to prevent a participant from improvidently bargaining away his or her retirement benefits voluntarily, but also to protect those benefits against the claims of general creditors. *Cf.* H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 280 (1974). "Section 206(d) represents a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . . ." *Guidry*, *supra*, 493 U.S. at 376.[36] *Amici* submit that ERISA's anti-alienation provision is one of the safeguards included in ERISA "'to completely secure the rights and expectations brought into being by this landmark reform legislation,'" *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990), citing and quoting S. Rep. No. 93-127, p. 36 (1973). *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 28 (1974), *reprinted in* 2 Leg. Hist. 2617.

In considering ERISA, Congress knew it was concerning itself with the financial security of "literally millions of working men and women." 3 Leg. Hist. 4707 (remarks of Rep. Mathias). ERISA was intended to usher in "a new era"

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[35] *See, e.g.*, 2 Leg. Hist. at 3371 (remarks of Rep. Perkins)(noting the need for adequate pension regulation and minimum Federal standards to "reduce pressure on the Social Security System and reduce the enormous costs of public welfare").

[36] Congress's concern to protect the interests of dependents was manifested again in 1984, when the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1440-41, amended I.R.C. § 401(a)(11) and added I.R.C. § 417 to protect the rights of spouses to joint and survivor annuities and pre-retirement survivor annuities.

for them by "providing new guarantees that the funds set aside for their retirement — from their own and their employer's contributions — will in fact be available for their retirement years." 3 Leg. Hist. 4819 (remarks of Sen. Packwood). Given the seriousness of Congress's purposes in enacting ERISA, it is difficult to believe that within four years Congress would subvert those purposes in the Bankruptcy Reform Act. It is still more difficult to believe that Congress would undo major premises of national pension policy not by what it said explicitly in the text of the Bankruptcy Reform Act, but *sub silentio*, by failing to mention the protection of pension benefits in a committee report.

2. If Sections 541(c)(2) and 522(b)(2)(A) are interpreted not to apply to ERISA-governed plans, the availability of a participant's plan assets to satisfy the claims of creditors in bankruptcy will depend entirely on state law. To permit state law to control creditors' access to plan assets is to permit state law to regulate pension plans, and ultimately to permit state law to determine the pay-out of benefits to plan participants. That result is inconsistent with *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981), where this Court struck down a New Jersey statute prohibiting the reduction of pension benefits by workers' compensation awards, because the statute purported to regulate the pay-out of benefits in a fashion inconsistent with federal law.

In addition, if the immunity of plan assets from bankruptcy claims hinges on state law, plan administration will become needlessly more complex, and plan fiduciaries will be burdened with extra duties and exposed to additional hazards. If state spendthrift trust law governs whether pension assets are available to creditors in bankruptcy, employers will feel compelled to design or redesign their

plans, if possible,[37] to take advantage of the protection afforded to spendthrift trusts under state law, and fiduciaries may find themselves exposed to liability for not having taken whatever steps are available to qualify their plans as spendthrift trusts under applicable state law (or for failing to have done so quickly enough to protect all their participants). As a result, state law, rather than ERISA, will supply the minimum standards for plan design.

Furthermore, to defend the interest of plan participants, prudent fiduciaries may find themselves forced to engage in extensive litigation over the state-law status of their plan. A favorable outcome on the issue of the plan's status as a spendthrift in one bankruptcy proceeding cannot be pled as *res judicata* in a subsequent bankruptcy proceeding against different parties. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). Therefore, plan sponsors will be in and out of bankruptcy courts on a regular basis, relitigating the state-law status of their plans, at least until they lose under circumstances where an adverse ruling can be raised against them as collateral estoppel. Typically, plan documents treat such litigation costs as an administrative expense, so that even solvent participants will pay part of the cost of such litigation. This result is at odds with this Court's holding in *FMC Corp*. v. *Holliday*, 111 S. Ct. 403, 408 (1990), where a state anti-subrogation law was held preempted by ERISA because the costs associated with being subject to differing state regulations would "produc[e] inefficiencies that employers might offset with decreased benefits."

[37] There is good reason to doubt that plans can fully transform themselves into state-law spendthrift trusts, to the extent they are not already spendthrift trusts. ERISA's "anti-cutback" rule generally prohibits the imposition of new restrictions on a participant's ability to withdraw benefits already accrued under the plan. *See* ERISA § 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B), I.R.C. § 411(d)(6), *and* Treas. Reg. § 1.411(d)-4.

Most significantly, if Section 541(c) is denied its full meaning, fiduciaries also will run the risk that their plans will be disqualified under some circumstances if they make distributions of plan assets to bankruptcy trustees. In a series of private letter rulings, the Internal Revenue Service has opined that a turnover of a participant's accrued benefits to a bankruptcy trustee will result in plan disqualification under I.R.C. § 401(a)(13).[38] The effect of plan disqualification on the retirement income security of employees is disastrous: further contributions to their plans are taxable when made, and under certain circumstances, vested participants are taxed on their funded benefits, even if those benefits are not in pay status. I.R.C. § 402(b). Furthermore, in all cases the plan will become taxable on its investment income. *Cf.* I.R.C. § 501(a). In addition, the employer may not deduct its contributions to a disqualified defined benefit plan, and therefore is unlikely to continue such a plan. *See* I.R.C. § 404(a)(5) *and* Treas. Reg. § 1.404(a)-12. Nor are these catastrophes confined to the debtor: since plan disqualification imposes these burdens on *all* participants, the bankruptcy of a single participant could destroy the hopes of thousands of others for a secure retirement.

Subjecting the rights of plan participants and the duties of plan fiduciaries to state law is utterly inconsistent with this

[38] *See, e.g.*, Private Letter Rulings 8131020 (May 5, 1981); 9109051 (December 5, 1990); 9011037 (December 20, 1989); 8951067 (September 28, 1989); and 8829009 (April 6, 1988).

The IRS might have ruled that it would disqualify a plan because of distributions to debtors' estates only if the plan was a state-law spendthrift trust. Even if the IRS had taken this more limited position, a plan administrator would nonetheless risk causing an inadvertent disqualification if it turned over plan assets on the assumption that the plan was not a spendthrift trust under applicable state law, and subsequently the IRS determined that the plan was a spendthrift trust.

Court's understanding of the fundamental premises of ERISA.[39] Preserving pension and welfare plan benefits from "the threat of conflicting inconsistent State and local regulation" was described as "the crowning achievement" of ERISA. 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent).[40] So strong was Congress's intention to preempt the field of benefit plan regulation that this Court has read ERISA's preemption clause, ERISA § 514(a), 29 U.S.C. § 1144(a), to preempt state regulation of matters on which ERISA is silent, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), and even to preempt state regulation seemingly designed to promote ERISA's purposes, *Mackey* v. *Lanier Collection Agency & Service*, 486 U.S. 825, 829-30 (1988).

3. The substantial deviations from national retirement income policy entailed in denying Section 541(c)(2) its plain meaning are unjustified. To permit a lender to reach pension plan assets in bankruptcy would be to confer "a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). Outside bankruptcy, creditors cannot look to the assets of an ERISA-governed pension plan. *Guidry*, *supra*, 493 U.S. at 371-72.

4. Finally, the prospect that some plan beneficiaries might be able to shield substantial sums in pension plans before filing for relief under the Bankruptcy Code has played a

[39] Time after time, this Court has upheld Congress's intention that "pension plan regulation [be] exclusively a federal concern." *Alessi*, *supra*, 451 U.S. at 523. "In the past, we have not hesitated to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 408 (1990).

[40] *See also id.* at 29,933 (Remarks of Sen. Williams) *and esp.* 120 Cong. Rec. 29,942 (Remarks of Sen. Javits) ("the interests of uniformity with respect to interstate plans require[s] . . . the displacement of State action in the field of private employee benefit programs").

disproportionately large part in the jurisprudence of Section 541(c)(2).[41] The typical pension plan participant — whether a participant in a plan sponsored by a major employer or in a plan of modest size — has little control over the amount or timing of contributions to his or her plan.[42] A more narrowly tailored remedy, use of the power to avoid fraudulent conveyances under 11 U.S.C. § 548, is available in the rare instances of abuse.[43] The protection given by ERISA § 206(d), 29 U.S.C. § 1056(d), to employee contribu-

[41] *See, e.g.*, *Goff*, *supra*, 706 F.2d at 577, 588; *Daniel*, *supra*, 771 F.2d at 1357. *See also Graham*, *supra*, 726 F.2d at 1270 (plan amended three days before bankruptcy to make benefits unavailable to debtor except upon total disability or at age 65).

[42] Employer contributions are subject to numerous limitations under the Internal Revenue Code. *See* I.R.C. §§ 401(a)(4), 401(k), 401(m), 402(g), 404, 415 and 4972 (1988). Employee contributions are typically made under rules that assume that the plan will comply with the Internal Revenue Code limits. Excess distributions and excess contributions are subject to excise taxes. I.R.C. §§ 4980A and 4972 (1988).

Congress tightened ERISA's contribution limits in the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982), *see generally* Notice 83-10, Questions and Answers Relating to Amendments to Employee Plans Provisions of the Internal Revenue Code by the Tax Equity and Fiscal Responsibility Act of 1982, 1983-1 C.B. 536-38, and again in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, *see generally* Notice 87-21, Employee Plans — New Limitations on Contributions and Benefits Under Section 415, 1987-1 C.B. 458-66, *and* Notice 89-45, Employee Plans — Application of Section 415(b)(5)(D), 1981-1 C.B. 684.

[43] *Cf. Pulaski Highway Express Co.* v. *Central States, S.E. & S.W. Areas Health & Welfare and Pension Funds*, 41 B.R. 305, 308-12 (Bankr. D. Tenn. 1984).

Guidry, *supra*, 493 U.S. at 371-72, need not be read as prohibiting recovery of fraudulently transferred plan contributions. *Guidry* applies only to remedies for judgments against a plan participant in personam, not to a judgment that property was transferred with the intent to hinder, delay or defraud creditors, the operation of which ordinarily is limited to recovery of the property from the transferee. *See generally* 37 C.J.S. *Fraudulent Conveyances* § 444 (1943).

tions that are within the limits established by Congress can be regarded as the result of "a considered congressional policy choice . . . to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Guidry*, *supra*, 493 U.S. at 376.

CONCLUSION

There is no basis in the language of Title 11, nor in any rule of construction or consideration of policy, for failing to read Section 541(c)(2) literally. To the contrary, limiting Section 541(c)(2) guarantees that some plan participants will lose their pensions and that plan administration will be governed in part by various conflicting state laws — results completely at odds with national retirement income policy established by ERISA and upheld repeatedly by this Court. For the foregoing reasons, *amici* request that the judgment below be affirmed.

Respectfully submitted,

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March 31, 1992

APPENDIX

APPENDIX

THE ERISA INDUSTRY COMMITTEE MEMBERSHIP LIST March 24, 1992

Aetna Life & Casualty Co.

Alexander & Alexander Services, Inc.

Allied-Signal Inc.

Aluminum Company of America

AMAX Inc.

American Express Company

American Home Products Corp.

American International Group, Inc.

American National Can Company

American Telephone & Telegraph Company

Ameritech

Amoco Corporation

Apache Corporation

Ashland Oil, Inc.

Atlantic Richfield Company

Ball Corporation

Bankers Trust Company

Becton Dickinson & Co.

Bell Atlantic Corporation

Bell Communications Research

BellSouth Corporation

Bethlehem Steel Corporation

The Boeing Company

BP America Inc.

Bristol-Myers Squibb Company

Buck Consultants, Inc.

Caterpillar Inc.

Champion International Corporation

The Chase Manhattan Bank N.A.

Chevron Corporation

Chrysler Corporation

CIBA-GEIGY Corp.

CIGNA Corp.

Citibank, N.A.

Coopers & Lybrand

Dana Corporation

Deere & Company

Delta Air Lines Inc.

Digital Equipment Corp.

The Dow Chemical Company

Dresser Industries Inc.

Du Pont Company

Eastman Kodak Company

Eli Lilly and Company

Enron Corp.

Equitable Life Assurance Society of the United States

Exxon Corporation

Federated Department Stores, Inc.

FMC Corporation

Ford Motor Company

A. Foster Higgins & Co., Inc.

General Electric Company

General Motors Corporation

W. R. Grace & Co.

Grand Metropolitan PLC

Grumman Corporation

GTE Corporation

Frank B. Hall & Co., Inc.

John Hancock Mutual Life Ins. Co.

Hazlehurst & Associates, Inc.

The Hearst Corporation

Hewitt Associates

Hewlett-Packard Co.

Honeywell Inc.

ICI Americas Inc.

International Business Machines Corporation

International Paper Company

International Telephone & Telegraph Corporation

Johnson & Johnson

Kraft Inc.

Lincoln National Corporation

LTV Corp.

Manufacturers Hanover Trust Co.

The Mead Corporation

William M. Mercer, Incorporated

Merck & Co. Inc.

Metropolitan Life Insurance Co.

Minnesota Mining & Manufacturing Co.

Mobil Oil Corp.

MONY Financial Services

J. P. Morgan & Co. Incorporated

Motorola, Inc.

Navistar International Corporation

NYNEX Corp.

Occidental Petroleum Corporation

Olin Corporation

Pacific Gas & Electric Company

Pacific Telesis Group

J. C. Penney Co., Inc.

Pennzoil Company

Pfizer Inc.

Philip Morris, Inc.

PPG Industries, Inc.

Price Waterhouse

Procter & Gamble Co.

The Prudential Insurance Company of America

Ralston Purina Co.

Reynolds Metals Co.

RJR Nabisco, Inc.

Rockwell International Corporation

Ryder System, Inc.

Schering - Plough Corporation

Scott Paper Company

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

The Southland Corporation

Supermarkets General Corp.

Tenneco Inc.

Texaco Inc.

Texas Instruments, Inc.

Textron Inc.

Time-Warner Incorporated

Towers Perrin Forster & Crosby

Travelers Insurance Company

TRW Inc.

Unilever United States, Inc.

Union Camp Corporation

Union Carbide Corporation

United Technologies Corporation

Unocal Corporation

U.S. West, Inc.

USX Corp.

Westvaco Corporation

Whirlpool Corporation

The Wyatt Company

ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC.
MEMBERSHIP LIST
March 23, 1992

A. Foster Higgins & Company, Inc.

Abarta, Inc.

Actuarial Sciences Associates, Inc.

Aerojet Headquarters

Aetna Life Insurance Company

Alexander & Alexander Consulting Group

Allied-Signal, Inc.

Aluminum Company of America

American Express Company

American Family Insurance Group

Ameritas Life Insurance Corp.

Ameritech, Inc.

Amoco Corporation

Arthur Andersen & Company

Associated Benefits Corporation

The Associated Group

ACTI

Association of Investment Management Sales Executives

ARA Services

ARMCO Inc.

B. Green & Company, Inc.

Bank of America

Bankers Trust Company

Baxter Healthcare Corporation

Bechtel Investments, Inc.

Bell Atlantic

BellSouth Corporation

Benefit Controls of S.C., Inc.

Blue Cross Blue Shield of Illinois

Blue Cross Blue Shield of Virginia

Boeing Company

Booke & Company

The Boston Company

Bryan, Pendleton, Swats, et al

Buck Consultants, Inc.

Burlington Industries

Burnett Company, Inc.

BANC ONE Corporation

BASF Corporation

BF Goodrich Company

Capital Guardian Trust Co.

The Chase Manhattan Bank, N.A.

CIGNA

Citibank

The Coastal Corporation

The Coca-Cola Company

Colgate-Palmolive Company

Columbia Gas System Service Corp.

Connecticut Mutual Life Ins. Co.

Continental Bank Corporation

ConAgra, Inc.

Cooper Industries, Inc.

Coopers & Lybrand

Coors Brewing Company

Council of Smaller Enterprises

Cox Enterprises, Inc

Crane Plastics Company

Crestar Bank

CBI Industries

CIGNA Corporation

CNA Insurance Companies

Daughters of Charity NHS

Digital Equipment Corporation

Dover Corporation

Dow Chemical Company USA

Duff & Phelps Financial Consulting

The Du Pont Company

Dyatron Corporation

Eastman Kodak Company

Empire Blue Cross & Blue Shield

Enron Corp.

Energy Services, Inc.

Epler Company

Equitable Life Assurance Society

Ernst & Young

Ethyl Corp.

Exxon Company, U.S.A.

Faegre & Benson

Federal Express

Fidelity Investments

Findley, Davies & Co.

First Interstate Bank

First Southern Trust Company

First Wachovia Corporation

Flagship Benefit Consultants, Inc.

Foley & Lardner

Food Marketing Institute

Gardner, Carton & Douglas

Gast Manufacturing Corporation

GenCorp

Gilbert, Segall & Young

Godwins, Inc.

Grand Aerie Fraternal Order of Eagles

Greenebaum Doll & McDonald

Group Health Coop. of Puget Sound

Grubbs and Company, Inc.

Guardian Industries Corp.

GATX Corporation

GTE Investment Management Corp.

Hallmark Cards, Inc.

Harris Trust & Savings Bank

Hay/Huggins Co., Inc.

Hazelhurst & Associates

Hershey Foods Corporation

Hewitt Associates

Hillyard Chemical Company

Holy Cross Shared Services, Inc.

Hooker & Holcombe, Inc.

Houston Lighting & Power Company

Hutchison & Associates, Inc.

Ingersoll-Rand Company

Insurer Central Services

Integrated Marketing Services

Inter-Local Pension Fund GCIU

ICI Americas, Inc.

IDS Financial Services

ITT/Hartford Insurance

Jenner & Block

John Hancock Mutual Life Ins. Co.

Johnson & Gibbs

Kraft General Foods

Kwasha Lipton

KPMG-Peat Marwick

Lawson Mardon Group Limited

Leggette & Company, Inc.

LeBoeuf, Lamb, Leiby & MacRae

Liberty Mutual Insurance Company

Litton Industries, Inc.

Lockheed Corporation

Loyola University of Chicago

Lynch, Jones, & Ryan

Mockenhaupt, Mockenhaupt, Cowden & Parks, Inc.

Maritime Overseas Corporation

Marriott Corporation

Massachusetts Financial Services

Massachusetts Mutual Life Ins. Co.

McCready and Keene, Inc.

McDermott, Will & Emery

McDonalds Corporation

The Mead Corporation

Mercedes-Benz of North America

Merck & Co., Inc.

Merrill Lynch

Metropolitan Life Insurance Co.

Miller Mason & Dickenson

Milliman & Robertson, Inc.

Mobil Oil Corporation

Money Market Directories, Inc.

Monsanto Company

Montgomery, McCracken, Walker et al

The Moore Company

Motorola Inc.

Mrs. Baird's Bakeries, Inc.

MAPCO Inc.

National Life Insurance Company

National Manufacturing Company

Nationwide Insurance Company

New England Investment Market, Inc.

New York GIC Exchange

New York Life Insurance Co.

Noble Lowndes

The Northern Trust Company

Nyhart-Company, Inc.

National Automobile Dealers & Associates Retirement

Ogle & Waters

ORYX Energy Company

Pacific Enterprises

Pacific Telesis Group

Paducah Newspapers, Inc.

Paine Webber

Patterson, Belknap, Webb & Tyler

PCI, Inc.

Pension Associates, Inc.

Pension Planning Co., Inc.

Philip Morris

Phillips Petroleum Company

Premark International, Inc.

The Principal Financial Group

Providence Journal Company

Provident Capital Management

Prudential Asset Management Co.

Purity Dairies, Inc.

The Putnam Companies

Raleigh Schwarz & Powell, Inc.

Reid and Reige, P.C.

Retirement System Group Inc.

Rock-Tenn Company

Rogers Benefit Group, Inc.

RJR Nabisco, Inc.

Sedgwick James Consulting Group

The Segal Company

Shell Oil Company

Shields Asset Management Inc.

Siegel Benefit Consultants, Inc.

Siemens Corporation

Signet Banking Corporation

The Southern Company

Southwestern Bell Corp.

Springs Industries, Inc.

Standard Insurance Company

Star Enterprise

State of Maryland, Personnel Dept.

State Mutual Companies

State Street Bank & Trust Co.

Steptoe & Johnson

Sun Company, Inc.

SAFECO Life Insurance Company

Tektronix, Inc.

Toshiba America, Info Systems, Inc.

Towers Perrin

Transamerica Life Ins. & Annuity Co

The Travelers Insurance Companies

Union Labor Life Insurance Co.

United Parcel Service, Inc.

United Telecommunications, Inc.

University of California

UIU Pension Trust

UNISYS Corporation

UNUM Life Insurance Company

USAA

US West, Inc.

Valero Energy Corporation

Vermont American Corp.

Vulcan Materials Company

VASA Brougher Inc.

W F Corroon

W. R. Grace & Co.

Washington Post

Webcrafters, Inc.

Westinghouse Electric Corporation

Weyerhaeuser Company

William M. Mercer, Incorporated

Willis Corroon Corporation

Willse & Associates, Inc.

Winn, Beaudry & Virden

Winthrop, Stimson, Putman & Roberts

Wm. Wrigley Jr. Company

The Wyatt Company

Y.M.C.A. Retirement Fund

11

Docket No. 91-913

IN THE

Supreme Court of the United States

October Term, 1991

JOHN R. PATTERSON, Trustee,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR RONALD J. WYLES AND REGINA L. WYLES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Counsel for Amicus Curiae

**MOTION OF
RONALD J. WYLES AND REGINA L. WYLES
FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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RONALD J. WYLES AND REGINA L. WYLES
FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE IN SUPPORT OF RESPONDENT

Ronald J. Wyles and Regina L. Wyles (collectively "the Wyles") respectfully move for leave to file a Brief as amicus curiae in this case in support of respondent, as provided by Rule 37 of the Rules of this Court. The written consent of the attorney for respondent has been obtained. The consent of the attorney for petitioner was requested but refused.

The Wyles are the appellees in a case now pending before the United States Court of Appeals for the Fourth Circuit. (Dean W. Sword, Jr., Trustee v. Ronald J. Wyles and Regina L. Wyles, Record No. 91-1633). The issue in the Wyles' case is identical to the issue before the Court in this case: whether the Employee Retirement

Insurance Security Act of 1974 ("ERISA") constitutes "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2) so that the non-alienation and assignment provisions contained in an ERISA and Internal Revenue Code qualified pension or profit sharing plan exclude a debtor's interest in the plan from the debtor's bankruptcy estate. In both Shumate's and Wyles' cases, debtors' interests in ERISA-qualified plans have been held exempt from inclusion in their bankruptcy estates under the decision of the Fourth Circuit in In re Moore, 907 F.2d 1476 (4th Cir. 1990). Because of the great similarity between this case and the Wyles' case, the Fourth Circuit entered an Order on September 26, 1991 holding the Wyles' case in abeyance pending this Court's disposition of this case. Thus, the decision in this case will control the outcome in the Wyles' case.

While the petitioner and respondent will concentrate on the peculiar facts of their own case, the issue presented by this case is also of monumental importance to debtors, trustees, the public policy set forth by Congress in enacting ERISA and the general public, all being concerned with the funding of retirement for citizens of the United States. The supremacy of ERISA over state law in the area of employee retirement benefits covered by ERISA depends on the result in this case. The general public must know whether Congress intended ERISA protection to lapse when a beneficiary of an ERISA plan files bankruptcy. The Brief on behalf of the Wyles addresses these broader concerns. The Wyles emphasize the statutory framework of ERISA and the Bankruptcy Code and requests this Court to examine the practical impact on retirement benefit issues that the result of this case

would have. The Wyles believe that their Brief would assist this Court in making its decision and in considering the broader questions affecting the employee retirement benefits of all citizens of the United States.

The Brief on behalf of the Wyles requests this Court to affirm the Fourth Circuit's decision in this case and supports the position of Joseph B. Shumate, Jr.

For the foregoing reasons, the Wyles respectfully request that this Motion be granted.

Respectfully submitted,

RONALD J. WYLES and
REGINA L. WYLES

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Of Counsel

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BRIEF FOR RONALD J. WYLES AND
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BRIEF FOR RONALD J. WYLES AND
REGINA L. WYLES AS AMICUS CURIAE

INTEREST OF RONALD J. WYLES AND
REGINA L. WYLES

The interest of Ronald J. Wyles and Regina L. Wyles (collectively "the Wyles") is set forth in the Wyles' motion for leave to file this Brief amicus curiae in support of the position of Joseph B. Shumate, Jr. ("Shumate").

SUMMARY OF THE ARGUMENT

I. ERISA constitutes "applicable nonbankruptcy law" under § 541(c)(2) of the Bankruptcy Code. Nothing in the clear and unambiguous language of this code section suggests that the phrase "applicable nonbankruptcy law" refers exclusively to state law, much less to state spendthrift trust law. When Congress intended to refer to state law, it did so explicitly in other areas of the

Bankruptcy Code. Furthermore, the phrase "applicable nonbankruptcy law", as used in other portions of the Bankruptcy Code, clearly refers to other federal laws. Because of this clear language there is no need to examine the legislative history of § 541(c)(2). Even so, the legislative history does not reflect an intention to exclude ERISA as "applicable nonbankruptcy law."

II. The Fourth Circuit's inclusion of the ERISA transfer restrictions within the meaning of the term "applicable nonbankruptcy law" as used in § 541(c)(2) fulfills Congress' intent regarding the protection of retirement benefits for citizens of the United States. The Fourth Circuit in this case harmonized ERISA and the Bankruptcy Code in a cohesive manner which gives full effect to both. Accordingly, if the ERISA non-alienation provisions are enforceable against general

creditors, they are enforceable against bankruptcy trustees. That the beneficiary may have potential control over the plan does not affect this result. Congress' policy choice to safeguard retirement benefits for ERISA plan beneficiaries must be upheld, even if the policy choice prevents others from securing relief for financial obligations owed them.

The decision by the Fourth Circuit in this case also preserves the tax-exempt status of ERISA-qualified plans by preventing creditors and bankruptcy trustees from obtaining access to plan benefits. It also ensures uniform treatment of retirement benefits throughout the United States by ensuring the supremacy of ERISA over state law and preventing state spendthrift law from nullifying the non-alienation provisions of ERISA. Finally, excluding ERISA plan interests from bankruptcy estates encourages

closely held corporations and small businesses to place pension assets in such plans. This implements Congress' intent to guaranty workers a defined pension benefit on retirement by protecting retirement benefits from others.

ARGUMENT

Section 541 of the Bankruptcy Code requires that all beneficial ownership interests of a debtor be included in the bankruptcy estate unless the interest contains "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under <u>applicable nonbankruptcy law</u>". <u>Id</u>. § 541(c)(2) (emphasis added). The Courts of Appeals for the Third, Fourth, Sixth and Tenth Circuits have all held that the Employment Retirement Insurance Security Act of 1974 ("ERISA") constitutes

"applicable nonbankruptcy law" and that an interest in a qualified ERISA pension or profit sharing plan is exempt from a bankruptcy estate under 11 U.S.C. § 541(c)(2). See Velis v. Kardanis, 949 F.2d 78 (3rd Cir. 1991); In re Moore, 907 F.2d 1476 (4th Cir. 1990); In re Lucas, 924 F.2d 597 (6th Cir.), cert. denied, 111 S.Ct. 2275 (1991); and In re Harline, 950 F.2d 669 (10th Cir. 1991). The Fourth Circuit's decision in this case was correctly based on the sound reasoning of these cases and this Court should affirm to give effect to the clear meaning of the language of §541(c)(2) of the Bankruptcy Code.

I. THE PHRASE "APPLICABLE NONBANKRUPTCY LAW" AS USED IN § 541(c)(2) APPLIES TO ERISA

A. The Language Of § 541(c)(2) Is Clear And Unambiguous In That It Refers to Both Federal And State Law.

The Fifth, Eighth, Ninth and Eleventh Circuits have held that a debtor's

interest in an ERISA-qualified plan is excluded from his bankruptcy estate only if the plan qualifies as a valid spendthrift trust under state law. In re Goff, 706 F.2d 574 (5th Cir. 1983); In re Graham, 726 F.2d 1268 (8th Cir. 1984); In re Daniel, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S.Ct. 1199, 89 L.Ed.2d 313 (1986); and In re Lichstrahl, 750 F.2d 1488 (11th Cir. 1985). These decisions rely on the legislative history of § 541(c)(2) which revealed Congress' desire to continue to exclude state-recognized spendthrift trusts. See Harline, supra, at 673. The reliance on legislative history, however, is inappropriate. Harline, at 674, Moore, supra, at 1478-1479.

In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself

must ordinarily be regarded as conclusive in determining its meaning. Burlington Northern R.R. v. Oklahoma Tax Commissioner, 481 U.S. 454, 461, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987) (citations omitted). Unless exceptional circumstances dictate otherwise, when the terms of a statute are unambiguous, judicial inquiry is complete. Id. Under this principal, the Third, Fourth, Sixth and Tenth Circuits have all found that the language of § 541(c)(2) is clear and unambiguous. See Harline, supra, at 674, Lucas, supra, at 600-601, Moore, supra, at 1477, and Velis, supra, at 81. In Moore, the Fourth Circuit held:

> Applicable non-bankruptcy law means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase "applicable nonbankruptcy law" or in the remainder of § 541(c)(2) suggests that the phrase refers

exclusively to state law much less to state spendthrift trust law.

Moore, at 1477.

The Fourth Circuit based its conclusion in Moore on a number of factors. First, other provisions of the Bankruptcy Code indicate that, when the Congress intended to specifically refer to state law, it did so explicitly. Moore, at 1478. For example, 11 U.S.C. § 109(c)(2) limits Chapter 9 filings to entities authorized to be such debtors under "State law"; 11 U.S.C. §§ 522(b)(1) and (2) ties certain debtor's exemptions to "State law that is applicable"; and 11 U.S.C. § 523(a)(5) denies discharge of any debt for support pursuant to an order "made in accordance with State or territorial law." Id. Had Congress intended § 541(c)(2) to apply only to state spendthrift trusts, the term "spendthrift trust" would have appeared in the statute

rather than the broad phrase "applicable nonbankruptcy law." In re Ralstin, 61 B.R. 502, 503 (Bankr. D. Kan. 1986).

Secondly, an interpretation of "applicable nonbankruptcy law" to include both federal and state law is consistent with Congress' use of the same term in other sections of the Bankruptcy Code. In 11 U.S.C. § 101(56) it used the phrase "applicable nonbankruptcy law" to refer to federal laws concerning trade secrets, patents and plant varieties. Harline, supra, at 674. In addition, courts have held that the phrase "applicable nonbankruptcy law" in §§ 108(a), (b) and (c) of the Bankruptcy Code refers to federal law. Harline, supra, citing Eagle-Picher Industries, Inc. v. United States, 937 F.2d 625, 639-40 (D.C. Cir. 1991) (Federal Tort Claims Act as "applicable nonbankruptcy law" under § 108(b)); In re Brickley, 70 B.R.

113, 115-116 (Bankr. 9th Cir. 1986) (IRC statute of limitation, 26 U.S.C. §6503, as "applicable nonbankruptcy law" under § 108(c)); Motor Carrier Audit & Collection Co., a Division of Delta Traffic Serv., Inc. v. Lighting Prods., Inc., 113 B.R. 424, 425-426 (N.D. Ill. 1989) (Interstate Commerce Act as "applicable nonbankruptcy law" under § 108(a)); and Eisenberg v. Feiner, (In re Ahead by A Length, Inc.), 100 B.R. 157, 162 (Bankr. S.D. N.Y. 1989) (RICO as "applicable nonbankruptcy law" under § 108(a)).

Accordingly, narrowly interpreting §541(c)(2) to only include state spendthrift law would be inconsistent with uses of the identical phrase throughout the Bankruptcy Code. Because words are presumed to have the same meaning in all subsections of the same statute, it would be incongruous to construe identical phrases in a single comprehensive

statute differently. Moore, at 1478 citing Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 633, 103 S.Ct. 2045, 2050 76 L.Ed.2d 194 (1983).

Finally, even were legislative history relevant, the Fourth Circuit found it inconclusive. Moore, at 1479. The legislative history reveals an express desire to preserve protection of state spendthrift trusts under bankruptcy law, but there is no express rejection of federal law including ERISA. See, H.R. Rep. No. 595, 95th Cong., 2d Sess. 369 (1977), reprinted in 1978 U.S.Code Cong. & Admin. News pp. 5963, 6325 and S.Rep. No. 989, 95th Cong., 2d Sess. 83, (1978), reprinted in 1978 U.S.Code Cong. & Admin. News pp. 5787, 5869. At most, these passages suggest Congress intended state spendthrift law to be included within the meaning of applicable nonbankruptcy law; however, nothing

in the legislative history indicates that Congress meant "applicable nonbankruptcy law" to refer <u>exclusively</u> to state spendthrift trust law. <u>See</u> <u>Moore</u>, at 1479.

II. THE FOURTH CIRCUIT'S INCLUSION OF THE ERISA TRANSFER RESTRICTIONS WITHIN THE MEANING OF THE TERM "APPLICABLE NONBANKRUPTCY LAW" AS USED IN § 541(c)(2) FULFILLS CONGRESS' INTENT REGARDING THE PROTECTION OF RETIREMENT BENEFITS FOR CITIZENS OF THE UNITED STATES

29 U.S.C. § 1056(d)(1) provides "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The Fourth Circuit held this non-alienation provision enforceable in bankruptcy and Shumate's pension plan interest not includable in Shumate's bankruptcy estate. This ruling is correct for these reasons.

A. Interpreting The ERISA Transfer Restrictions As "Applicable Nonbankruptcy Law" Harmonizes ERISA And The Bankruptcy Code.

In this case, the Fourth Circuit followed its previous decision in Moore by interpreting ERISA and the Bankruptcy Code to give full effect to both statutes. Shumate v. Patterson, 943 F.2d 362, 365 (4th Cir. 1991). In Moore, the Fourth Circuit discussed the interaction of ERISA and bankruptcy law at length and as the Sixth Circuit observed in Lucas, gave full effect to the express language of both the Bankruptcy Code and ERISA. Lucas, at 603. Moreover, the Moore decision harmonized bankruptcy law and ERISA. Lucas, at 603; In re Majul, 119 B.R. 118, 123 (W.D. Tex. 1990). The Fourth Circuit thoroughly justified its ruling in light of bankruptcy and ERISA law:

> We see no evidence that Congress intended to invite a creditor to push a debtor into involuntary bankruptcy in order to reach his ERISA funds.

Because ERISA clearly prevents general creditors from reaching a debtor's interest in this ERISA-qualified trust, it constitutes "applicable nonbankruptcy law" under which restrictions on the transfer of pension interests may be enforced. "Under the plain and simple language of Section 541(c)(2), if the ERISA anti-alienation provisions are enforceable against general creditors, they are enforceable against the bankruptcy trustee."

In addition to being faithful to the language of both the Bankruptcy Code and ERISA, this conclusion furthers ERISA's broader purpose of ensuring uniform treatment of pension benefits throughout the country . . ..

We can best harmonize ERISA, the Bankruptcy Code, and the Internal Revenue Code by reading "applicable nonbankruptcy law," 11 U.S.C. § 541(c)(2), to include ERISA.

Moore, at 1480-1481 (citations omitted). This harmonious reading of the statutes was also noted and followed in Lucas, at 603, and Harline, at 675-676.

B. The Debtor's Potential Control Over The Plan Does Not Determine Whether the ERISA Transfer Restrictions Are Enforceable As "Applicable Nonbankruptcy Law."

In this case the Fourth Circuit held that Shumate's interest was excludable even though he could potentially control the pension plan. Based on the policy reasons of ERISA, the Fourth Circuit concluded that its decision did not rest on the beneficiary-settlor-trust relationship, but instead on the status of the plan as ERISA-qualified. Shumate, at 364-365. The public policy choices of Congress reflected in ERISA support this conclusion.

ERISA requires a qualified plan to have non-alienation provisions. 29 U.S.C. §

1056(d)(1); 26 U.S.C. § 401(a)(13). Both voluntary and involuntary encroachments on vested benefits are prohibited by these restrictions. General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980). Neither plan participants nor general creditors may reach benefits under ERISA-qualified plans. Moore, supra, at 1480. These restrictions reflect a "strong public policy against the alienability of an ERISA plan participant's benefits." Smith v. Mirman, 749 F.2d 181, 183 (4th Cir. 1984). Recently, this Court recognized this strong public policy against alienability in Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990):

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually

> are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Guidry, at 493 U.S. 376 (footnote omitted).

In In re Majul, 119 B.R. 118 (Bankr. W.D. Tex. 1990), the Bankruptcy Court protected self-settled trusts based on these same policy reasons. Majul, at 118. Majul involved pension and profit sharing plans created by a professional corporation. The debtor was the sole shareholder and director of the corporation. The court held that the debtor's interests in the plans were not property of his bankruptcy estate even if the plans constituted self-settled trusts under state spendthrift law. Majul, at 124. In so deciding, the court followed the Moore decision and was heavily influenced by the

policy issues discussed in Moore and Guidry, stating that the broad construction placed on 206(d) of ERISA by this Court indicated a policy prohibition against alienation of pension benefits, rather than merely a requirement for ERISA qualification. Majul, at 121-122. The court concluded that "ERISA qualified pension plans, even if they would be settlor trusts under state spendthrift trust law, are not included within the 'property of the estate.'" Id., at 124. (emphasis added).

Given the strong public policy against alienability, no further inquiry is required to determine whether the plan trust is controlled by the debtor. Shumate, at 364-365. The status of the plan as ERISA-qualified is all that is required. Id. Even if the debtor could potentially control the plan, his interest in the plan is

protected from inclusion in the bankruptcy estate. Surely, if this Court could hold, however distasteful the result, that the public policy expressed in ERISA protects the plan interests of a confessed embezzler, see Guidry, supra, at 493 U.S. 367, 377, it should hold that the interests of an innocent debtor with potential control over the plan are also protected. See Majul, supra, at 123, n.5.

C. The Standard Set Forth In This Case Preserves The Tax Exempt Status Of ERISA-Qualified Plans, Ensures Uniform Treatment Of Retirement Benefits Throughout The United States And Encourages Businesses To Establish ERISA Plans.

The Fourth Circuit adopted the rule in Moore after a careful consideration of the effects of its decision and after closely reviewing the decisions of other courts which do not follow the Moore rule. The Moore decision leads to favorable results on several policy issues.

> First, it harmonizes the Bankruptcy Code, ERISA, and the Internal Revenue Code and gives full effect to the express language of those statutes. Second, it prevents a [qualified retirement] plan from being subject to disqualification and loss of tax-exempt status when a bankruptcy trustee seeks turnover of a single debtor's interest in a plan. Finally, it guarantees uniform treatment of [retirement] benefits throughout the country.

Lucas, supra, at 603 (citation omitted).

If the holding of Moore is reversed by this case, every ERISA-qualified plan in the country would be subject to disqualification and loss of tax-exempt status. By seeking turnover of a single bankrupt's interest in a plan, bankruptcy trustees would disqualify entire plans. When a plan's interest is included in a bankrupt's

estate, the plan's anti-assignment provisions required by 26 U.S.C. § 401(c)(13) and 29 U.S.C. § 1056(d)(1) are violated. This could lead to disqualification of every such plan and loss of tax-exempt status. See Moore, at 1480-1481; Mclean v. Central States, Southeast & Southwest Areas Pension Fund, 762 F.2d 1204, 1206 (4th Cir. 1985) (position of IRS is that payover of ERISA funds to Chapter 13 bankruptcy trustee causes the plan to lose its ERISA qualification and tax-exempt status). Furthermore, including ERISA plan interests in the bankruptcy estate would invite creditors to push debtors into involuntary bankruptcy to reach their ERISA funds. Congress certainly did not intend these results. Moore, at 1480, 1481.

The Fourth Circuit's holding in this case furthers ERISA's purpose of ensuring uniform treatment of pension benefits

throughout the country. See Moore, at 1480 citing Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 15-17, 107 S.Ct. 2211, 2219-2220, 96 L.Ed.2d 1 (1987). ERISA overrides state law in the area of employee retirement benefits and its preemption feature has been broadly construed. Harline, at 672 citing FMC Corp. v. Holliday, 498 U.S. ___, 111 S.Ct. 403, 407 112 L.Ed.2d 356 (1990).

In jurisdictions not following the Moore rule, there must be a trial almost every time a trustee asserts an interest in a retirement plan, which will result in inconsistent rulings in cases with similar facts. The Fourth Circuit intended to protect the security of employee retirement benefits from the vagaries of state spendthrift laws. Moore, at 1480. If this case is not upheld the particularities of state spendthrift law could nullify the non-alienation provisions of

ERISA. This would contradict the statutory scheme protecting ERISA from state and local laws and frustrate the goals of ERISA, contrary to its general preemption provisions. As the Tenth Circuit noted in Harline:

> We are also persuaded by the incongruity inherent in the narrower interpretation which would result in ERISA's antialienation provisions trumping state law until bankruptcy, but withdrawing that protection upon bankruptcy unless state law would give it.

Harline, at 675. See, also, Moore, at 1480; Lucas, at 603.

Finally, if ERISA plan interests are included in bankruptcy estates, many small and closely held corporations would not establish such plans. If these businesses could not place pension assets beyond the reach of creditors in bankruptcy, many plans would be

cancelled or never established. This result runs counter to the intent of Congress as noted by this Court in <u>Connolly v. Pension Benefit Guaranty Corp.</u>, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986):

> In addition to prescribing standards for the funding, management, and benefit provisions of these plans, ERISA also established a system of pension benefit insurance. This "comprehensive and reticulated statute" was designed to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans. . .. Congress wanted to guarantee that "if a worker has been promised a defined pension benefit upon retirement-and if he has fulfilled whatever conditions are required to obtain a vested benefit-he will actually receive it."

Connolly, 475 U.S. at 214, 106 S.Ct. at 1029 (quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 720, 104 S.Ct. 2709, 2713, 81 L.Ed.2d 601 (1984) (citation omitted)).

CONCLUSION

Under Moore and its progeny, Shumate's interest in the plan is not an asset of his bankruptcy estate. The clear language of the Bankruptcy Code indicates that ERISA constitutes "applicable nonbankruptcy law." The Fourth Circuit's holding of ERISA as "applicable nonbankruptcy law" fulfills the public policy considerations expressed by Congress and clearly establishes that interests in ERISA-qualified plans are not part of a debtor's bankruptcy estate. Therefore, this Court should affirm the Fourth Circuit and hold that Shumate's interest in

the plans are not assets of his bankruptcy estate.

Respectfully submitted,

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By [signature]
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PROOF OF SERVICE

I, David H. Adams, counsel for Amicus Curiae and a member of the bar of the Supreme Court of the United States, hereby certify that three (3) true copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief for Ronald J. Wyles and Regina L. Wyles as Amicus Curiae in Support of Respondent were mailed, first class postage prepaid, to James R. Sheeran, Esquire, Post Office Drawer 69, Portsmouth, VA 23705; Debera F. Conlon, Assistant U.S. Trustee, Room 433, Federal Building, 200 Granby Mall, Norfolk, Virginia 23510; Robert A. Lefkowitz, Esquire, Maloney, Yeatts & Barr, P.C., 600 Ross Building, 801 East Main Street, Richmond, Virginia 23219-2906; and G. Steven Agee, Esquire, Osterhoudt, Ferguson, Natt, Aheron & Agee, P.C., 1919 Electric Road, S.W., Roanoke,

Virginia 24018 on this 31st day of March, 1992.

David H. Adams

David H. Adams

AFFIDAVIT FOR PROOF OF FILING

I, David H. Adams, counsel for Amicus Curiae and a member of the bar of the Supreme Court of the United States, hereby certify that I hand delivered by courier to the Clerk of the Supreme Court of the United States within the time allowed for filing, the foregoing Motion for Leave to File Brief Amicus Curiae and Brief for Ronald J. Wyles and Regina L. Wyles as Amicus Curiae in Support of Respondent on March 31st, 1992.

David H. Adams

David H. Adams

Signed and sworn before me, at Virginia Beach, Virginia, this 31st day of March, 1992.

Patricia L. Wise
Notary Public

My Commission expires: 5/30/95

(12)

No. 91-913

IN THE
Supreme Court of the United States
OCTOBER TERM 1991

JOHN G. PATTERSON, TRUSTEE,
Petitioner
v.
JOSEPH B. SHUMATE, JR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SUPPORTING RESPONDENT

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file a brief as *amicus curiae* in support of respondent, Joseph B. Shumate, Jr. In support of this motion, the Chamber states as follows:

1. This motion is necessitated by the refusal of counsel for the Petitioner to consent to the filing of an *amicus curiae* brief by the Chamber.

2. This Court has granted Respondent's motion to proceed in *forma pauperis* and Respondent has

consented to the Chamber's filing of the accompanying *amicus curiae* brief.

3. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 190,000 businesses and organizations and serves as the principal voice of the American business community.

4. The Chamber regularly represents the interests of its member-employers in important employee benefits, employment and labor relations matters, vitally affecting those interests, before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing *amicus curiae* briefs in a wide spectrum of employee benefits and labor relations litigation. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S.Ct. 478 (1990); *FMC Corp. v. Holliday*, —— U.S. ——, 111 S.Ct. 403 (1990).

5. The instant case presents an issue of great significance for the Court—i.e. the right of retirement plans and retirement plan sponsors offering future retirement benefits pursuant to federally mandated spendthrift provisions to avoid disruption of the operation of such plans due to the bankruptcy of plan participants.

6. This issue is of vital concern to the Chamber and all its member-employers. Annual surveys of Chamber members reflect that most Chamber members sponsor retirement plans which will be affected by the decision in this case.[1] At the same time many Chamber members extend consumer credit as their principal business or as a significant part of their business activities.[2]

7. The Fourth Circuit's decision in the instant case and similar decisions in the Third, Sixth and Tenth Circuits confirmed that retirement benefits are excluded from the bankruptcy estate of insolvent plan participants. If this Court adopts Petitioner's rationale and treats retirement benefits as a part of an insolvent plan participant's bankruptcy estate, it will dramatically alter the operation of retirement plans and the retirement security of plan participants.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying *amicus curiae* brief in support of the Respondent, Joseph B. Shumate, Jr.

Respectfully submitted,

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[1] In the most recent Chamber survey, 84.8 percent of the Chamber members surveyed indicated that, in 1990 plan years, they made company contributions to fund the cost of providing retirement benefits. This survey included responses from 1,000 member companies who responded to the annual survey mailed to member companies who were chosen to represent a cross section of the Chamber's membership by size, industry and geographic location. More than 3.7 million employees are employed by the 1,000 companies that responded to the survey. Chamber, Employee Benefits 1991 Edition 5, 24-25 (1991).

[2] Chamber members include eight of the ten largest bank credit card lenders listed in the American Bankers Association annual survey for the year ended December 31, 1990. *The Top 25 Companies in Bank Credit Cards*, American Banker, Sept. 10, 1991, at 9A.

QUESTIONS PRESENTED

1. Do retirement plan restrictions on transfer or assignment required by Section 206(d) of the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 401(a)(13) of the Internal Revenue Code (the "I.R.C.") constitute "applicable nonbankruptcy law" as that phrase is used in Section 541(c)(2) of the Bankruptcy Code of 1978?

2. Should this court limit the availability of the protections of the spendthrift trust provision of Section 541(c)(2) of the Bankruptcy Code of 1978 in the case of debtors who are or were highly compensated employees, officers or owner-employees of the plan sponsor?

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

For brevity, the Chamber of Commerce of the United States (the "Chamber") respectfully requests that the Statement of Interest contained in the accompanying Motion for Leave to File Brief *Amicus Curiae* be incorporated into this brief by reference.

SUMMARY OF THE CASE

Joseph Shumate worked for more than 30 years for Coleman Furniture Co. ("Coleman").[1] Shumate accrued a benefit under a pension plan established by Coleman in 1963.[2] By 1971 he had completed the full 20 year period

[1] Shumate was hired at age 21 on September 5, 1951 and worked for Coleman continually until February 24, 1983, except for a military leave. J.A. Vol. I, at 14-15 & 90-91.

[2] J.A., Vol. I, at 12-13 & 90, Vol. II, at 233.

of service taken into account for purposes of the relevant pension plan benefit formula.[3]

Shumate rose through the ranks until 1979, when he purchased a controlling interest in Coleman in a leveraged buyout and became its President.[4] Shumate's management of Coleman was subject to extensive controls imposed by the bank that financed such purchase.[5] In late 1982, the venture failed and Coleman filed for Chapter 11 reorganization.[6]

In February of 1983, Shumate's tenure as President of Coleman ended.[7] In June of 1984, Mr. Shumate's personal financial burdens arising out of the failure of the leveraged buyout of Coleman forced him to seek bankruptcy protection.[8]

In 1987, the Coleman pension plan began to wind up its affairs.[9] However, the bankruptcy trustee appointed in Shumate's proceeding contested Shumate's rights to receive his pension benefits.[10]

Mr. Shumate's pension was stipulated to be worth $250,000, the estimated purchase price of an annuity contract providing Sumate with a monthly benefit of $1,603.23.[11] Because Shumate is now age 68 and unemployed, it is unlikely he will be able to accumulate a meaningful retirement benefit from other employment if he is stripped of the pension he earned over his 30 years of service with Coleman.

[3] Only 20 years of service counted towards a final average pay formula. Plan § 4.01(a), J.A., Vol. II, at 403-04. However, that formula counted Shumate's final average compensation after 1971 and service until 1981 counted towards early retirement. Plan §§ 3.03, 4.01(a) & 4.03, J.A., Vol. II, at 403-04 & 407.

[4] J.A., Vol. I, at 119-20 & 125-31; Petitioner's Brief at 5.

[5] J.A., Vol. I, at 125-31 & 158-59.

[6] J.A., Vol. I, at 13 & 90. After an eight month effort to reorganize Coleman, the bankruptcy was converted to a Chapter 7 liquidation. *Id.*

[7] J.A., Vol. I, at 14-15 & 90.

[8] J.A., Vol. I, at 18 & 90.

[9] J.A., Vol. I, at 56-83.

[10] J.A., Vol. I, at 170-177.

[11] J.A., Vol. I, at 102. Annuities must be offered when a plan terminates. 29 U.S.C. §§ 1054(g), 1055(g) & 1341 (1988); I.R.C. §§ 411(a)(11), 411(d)(6). The annuities must be nontransferable as required by ERISA Section 206(d) and I.R.C. Section 401(a)(13).

Petitioner sought to include Shumate's retirement benefits in his bankruptcy estate on a theory that such benefits are not spendthrift trust benefits protected from such inclusion by Section 541(c)(2)[12] of the Bankruptcy Code of 1978 (the "Code").[13] The district court agreed with the petitioner's argument that the Section 541(c)(2) exclusion of spendthrift trust benefits from a bankruptcy estate is limited to spendthrift trust benefits rendered nontransferable and nonassignable under applicable state law, not benefits rendered nontransferable and nonassignable by federal law.[14]

The Fourth Circuit, relying upon its prior holding in *In re Moore*,[15] held that the plain meaning of the phrase "applicable nonbankruptcy law" in Section 541(c)(2) of the Bankruptcy Code ("Code Section 541(c)(2)") encompasses spendthrift restrictions of federal as well as state law.[16] The court below also expressly concluded that

[12] 11 U.S.C. § 541(c)(2) (1988).

[13] Pub. L. No. 95-598, 92 Stat 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1329) [hereinafter cited and generally referred to as the Code].

[14] *Creasy v. Coleman Furniture Corp.*, 83 Bankr. 404 (W.D. Va. 1988). The District Court relied upon *In re Goff*, 706 F.2d 574 (5th Cir. 1983). *See also, In re Daniel*, 771 F.2d 1352 (9th Cir. 1985); *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985); *In re Graham*, 726 F.2d 1268 (8th Cir. 1984). *Cf. Regan v. Ross*, 691 F.2d 81 (2d Cir. 1982).

[15] *In re Moore*, 907 F.2d 1476, 1478-79 (4th Cir. 1990). *Accord, In re Harline*, 950 F.2d 669, 674-75 (10th Cir. 1991); *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991); *In re Lucas*, 924 F.2d 597, 600-02 (6th Cir. 1991); *In re Kincaid*, 917 F.2d 1162, 1169-70 (9th Cir. 1990) (concurring opinion).

[16] *Shumate v. Patterson*, 943 F.2d 362, 363-64 (4th Cir. 1991).

the restrictions on participant assignments or transfers required by Section 206(d)[17] of the Employee Retirement Income Security Act fo 1974[18] are spendthrift restrictions protected by Code Section 541(c)(2).[19]

SUMMARY OF ARGUMENT

The decision of the court below must be upheld because it interprets the provisions of Section 541(c)(2) of the Bankruptcy Code[20] in a manner which is consistent with the relevant principles of statutory interpretation recognized by this Court, including the plain meaning rule. The phrase "applicable bankruptcy law" is broad and unqualified and the same phrase is used elsewhere in the Bankruptcy Code in provisions which clearly encompass federal law. Where Congress intended to limit a provision of the Bankruptcy Code to state law, it did so expressly.

The decision below is also consistent with the legislative history of the Bankruptcy Code of 1978 when viewed against the backdrop of the history of our federal bankruptcy system. A comparison of the initial versions of that legislation and the Bankruptcy Commission Report on which they were based with the Bankruptcy Code of 1978, as finally enacted, demonstrates conclusively that Bankruptcy Code Section 522 cannot be used, as the Petitioner suggests, to vary the plain meaning of the spendthrift trust exclusion of Bankruptcy Code Section

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[17] 29 U.S.C. § 1056(d) (Supp. I 1989 & 1988).

[18] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 26 & 29 U.S.C.) [hereinafter cited and referred to as ERISA].

[19] 943 F.2d 362, 363-64. *Accord In re Harline*, 950 F.2d 669, 674-75 (10th Cir. 1991), *Velis v. Kardanis*, 949 F.2d 78, 82 (3d Cir. 1991); *In re Lucas*, 924 F.2d 597, 600-02 (6th Cir. 1991); *In re Kincaid*, 917 F.2d 1162, 1169-70 (9th Cir. 1990) (concurring opinion); *In re Moore*, 907 F.2d 1476, 1479-81 (4th Cir. 1990).

[20] 11 U.S.C. § 541(c)(2) (1988).

541(c)(2). This comparison conclusively demonstrates that the Section 522 exemption for qualified plans, upon which Petitioner rests his entire analysis, was merely a dependant second step in a proposed, but unenacted two-step mechanism. As finally enacted by Congress, Section 541(c)(2) preserved the long standing spendthrift trust exclusion from the initial bankruptcy estate.

Further, the decision below is consistent with the objectives of the Bankruptcy Code of 1978, harmonizes the Bankruptcy Code with the objectives of ERISA and the I.R.C., and avoids the hardship which will be imposed upon the retirement plan system if the Petitioner's view were to prevail.

Finally, the decision below also correctly rejects the Petitioner's attempt to read into Section 541 of the Bankruptcy Code a disparate treatment of plan participants who are officers or owners of a plan sponsor. Such a distinction is inconsistent with the broad scope of Bankruptcy Code Section 541(c)(2) and engrafts new language on Section 541 in order to serve objectives which have already been adequately addressed by Congress in another manner in ERISA and the I.R.C.

ARGUMENT

I. THE NONALIENATION PROVISIONS OF ERISA AND THE I.R.C. ARE "APPLICABLE NONBANKRUPTCY LAWS" WITHIN THE MEANING OF SECTION 541(c)(2) OF THE BANKRUPTCY CODE.

A. Statutory Provision.

Code Section 541(a)(1) establishes a general rule that the bankruptcy estate includes "all legal or equitable interests of the debtor in property.[21]

Section 541(c)(2) varies this general rule of inclusion with respect to beneficial interests in property which are subject to spendthrift or other transfer restrictions:

> (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable

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[21] 11 U.S.C. § 541(a)(1) (1988).

under *applicable nonbankruptcy law* is enforceable in a case under this title.[22] (emphasis added)

B. Retirement Plan Nonalienation Provisions As Spendthrift Provisions.

The court below correctly held that the provisions of Section 206(d) of ERISA and Section 401(a)(13) of the I.R.C. which require retirement plans to prohibit transfers or assignments of future retirement benefits[23] are spendthrift restrictions of "applicable nonbankruptcy law" within the meaning of Code Section 541(c)(2).[24]

In a leading preemption case, this Court expressed the view that the ERISA Section 206(d) nonalienation rule is a spendthrift restriction which is "consonant with" other federal spendthrift rules.[25]

C. The "Plain Meaning" of "Applicable Nonbankruptcy Law."

The narrow textual issue before this Court is the meaning of the phrase "applicable nonbankruptcy law."

This Court has consistently held that the most persuasive evidence of legislative intent is the plain meaning of the words of a statute.[26] At its heart, the plain meaning doctrine calls for a textual analysis of the statutory language. However, this textual analysis is not narrowly limited to the words being construed. Rather, the plain meaning of the statute must be read in the context of the entire statute within which those words appear.[27]

On its face, the terms "applicable nonbankruptcy law" are broad and unqualified. The phrase does not refer to any specific body of state or federal law. Congress used the limiting term "state" where it intended to do so.[28] The Code contains no definition of "applicable nonbankruptcy law."[29] Nevertheless, when the same phrase is used elsewhere, it is clear that the phrase encompasses federal law.[30] This court has generally presumed that multiple uses of the same term in a single statute will have the same meaning.[31]

Thus, Code Section 541(c)(2) is unambiguous and this Court need look no further than the statute itself to conclude that Code Section 541(c)(2) protects the assets and benefits of retirement plans which are subject to nonalienation provisions required by ERISA and the I.R.C. However, the legislative history of Congressional enact-

[22] 11 U.S.C. § 541(c)(2)(1988) (emphasis added).

[23] A plan must expressly prohibit assignments or transfers of plan benefits. 29 U.S.C. § 1056(d)(1)(1988); I.R.C. § 401(a)(13)(A). Plans may be funded by a trust or an insurance fund or custodial account with the essential "separate fund" characteristics of a trust. I.R.C. § 401(a); 29 U.S.C. § 1103 (1988 & Supp. I 1989). Such arrangements are deemed to constitute trusts. I.R.C. § 401(f).

[24] *Shumate v. Patterson*, 943 F.2d 362, 363-64 (4th Cir. 1991), *cert. granted*, — U.S. —, 112 S.Ct. 932 (1992).

[25] *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 371-72 & n.13 (1990). (ERISA Section 206(d) bar to constructive trust.) *See also* notes 81-83 *infra* & accompanying text.

[26] *Ardestani v. Immigration and Naturalization Service*, — U.S. —, 112 S. Ct. 515, 520 (1991). *See also, Norfolk & Western Ry. v. American Train Dispatchers Assn.*, — U.S. —, 111 S.Ct. 1156, 1163 (1991); *West Va. Univ. Hospitals, Inc. v. Casey*, — U.S. —, 111 S.Ct. 1138, 1147 (1991).

[27] *King v. St. Vincent's Hospital*, — U.S. —, 112 S.Ct. 570, 574 (1991). *See also, McCarthy v. Bronson*, — U.S. —, 111 S.Ct. 1737, 1740 (1991).

[28] 11 U.S.C. §§ 109(c)(2), 362(b)(12), 522(b)(1), 522(b)(2), 523(a)(5), 903(1) & 1145(a) (1988 & Supp. II 1990). *See In re Moore*, 907 F.2d 1476, 1478 (4th Cir. 1990).

[29] The absence of a definition suggests strongly that the reference to "law" is not limited as to jurisdiction. This Court has followed the principle that where a statute uses an established term without providing a definition, it should be presumed that "Congress intended it to have its established meaning." *McDermott Int'l v. Wilander*, — U.S. —, 111 S. Ct. 807, 811 (1991).

[30] 11 U.S.C. §§ 108(a) & 1125(d) (1988). *See In re Moore*, 907 F.2d 1476, 1477-78 (4th Cir. 1990).

[31] *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983). *See, In re Moore*, 907 F.2d 1476, 1478 (4th Cir. 1990).

ment of Section 541(c)(2) also supports this interpretation.

D. Legislative History of 1978 Enactment of Section 541(c)(2).

Because of the complex history and the relative continuity of many bankruptcy practices, this Court has proceeded with special care in interpreting amendments to federal bankruptcy laws. This Court has expressed the view that such interpretations require a special attention to the past interpretations of terms and concepts that remain a part of modern bankrupcy statutes. During the current term this Court observed that:

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." . . . [T]his Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.[32]

This principle of interpretation is directly applicable to this case.

1. *The Constitutional, Legislative, Common Law and Civil Law Antecedents to Section 541(c)(2).*

Bankruptcy systems have provided for the division of the assets of insolvent debtors among the debtors' creditors since at least 600 B.C.[33] Throughout history, bankruptcy systems rewarded "good" debtors who cooperated

[32] *Dewsnup v. Timm*, —— U.S. ——, 112 S.Ct. 773, 779 (1992).

[33] Noel, *A History of the Bankruptcy Clause of the Constitution of the United States*, 12-15, 15 n.20, 19, 21-70, 124 & 198 (undated PhD dissertation submitted to the Philosophy Faculty of Catholic Univ. of America, circa 1919) [hereinafter cited as Bankruptcy History]. Although there is evidence of a formal bankruptcy system in Athens, the Roman system bears much more resemblance to the English system upon which our federal bankruptcy system is based. *Id.*, at 12-13 & 19. *See also, Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911); *Continental Ill. Nat'l Bank v. Chicago R.I. & P. Ry.*, 294 U.S. 648, 674 (1935).

with the bankruptcy process with more lenient treatment than would be afforded "bad" debtors.[34] The leniency shown to cooperative debtors before the nineteenth century bears little resemblance to the lenience shown under modern bankruptcy statutes.[35] However, the nature of the cooperative behavior expected in exchange for lenience has changed very little. A debtor was expected to assist in the collection of his or her property and transfer of such property to an appropriate official or representative of unpaid creditors.[36]

The dividing line used to determine property includible in a bankruptcy estate is based upon this model of "good" debtor behavior. Since a debtor cannot assign or transfer assets held for his or her benefit under a trust subject to a spendthrift restriction, federal law consistently excluded such trust assets from the bankruptcy estate.[37]

Until 1841, this focus upon debtor cooperation was more important to the identification of the bankruptcy estate than it is today because prior to that year there was no provision for automatic vesting of the debtor's property rights in a receiver or trustee.[38] The Bankruptcy Acts of

[34] Bankruptcy History, *supra* note 33, at 11-12, 16-17, 19, 21, 27-29, 38, 43-44, 46-49, 51, 54-57, 61-62, 65 & 69. *See* 11 U.S.C. §§ 521 & 523(a)(3) (1988).

[35] Most early bankruptcy systems were extremely punitive. Leniency usually meant that the debtor would not be executed or become enslaved, indentured or imprisoned, Bankruptcy History, *supra* note 33, at 15-17, 19, 27-29, 38, 43-44, 46-49, 51, 54-57, 62, 65 & 69. Today, cooperation will entitle a nonfraudulent debtor to a discharge of debts not fully satisfied as a result of the division of the bankruptcy estate among the bankrupt debtors. 11 U.S.C. §§ 521 & 523(a)(3).

[36] Bankruptcy History, *supra* note 33, at 11-12, 16, 19, 28-29, 38, 48-49, 56-57, & 62.

[37] *See infra* notes 43-63 & 103-4 & accompanying text.

[38] Bankruptcy Act of 1841, § 3 ch. 9, 5 Stat. 440, 442-43. The Bankruptcy Code of 1800 did empower receivers to initiate collection actions and recover the debtor's assets in this fashion. Bankruptcy Code of 1800, § 18, ch. 19, 2 Stat. 19. The power to seize

1841, 1867, 1898 and 1938 all reduced bankruptcy trustees' procedural burdens and the administrative costs and paperwork burdens of bankruptcy by reducing the trustees' reliance upon the debtor. Under all these statutes, bankruptcy trustees automatically acquired title to whatever property the bankrupt debtor could reach.[39] Importantly, all federal bankruptcy statutes enacted since 1867 have expressly prevented this automatic title vesting rule from applying to spendthrift trusts.[40] Although debtors have not been required to participate in the formal transfer of title to property since the nineteenth century, the definition of the assets that constitute the bankruptcy estate has continued to echo the earlier era when the debtor was required to participate in formal transfer of title. Debtors are still required to cooperate and will only receive a discharge of debts if they do so.[41]

Section 70(a)(5) of the Bankruptcy Act of 1898, as in effect prior to enactment of the Code, implemented this spendthrift trust protection by including in a bankruptcy estate:

> Sec. 70. TITLE TO PROPERTY
>
> a . . . (5) property, including rights of action, which prior to the filing of the petition he *could* by any means *have transferred or* which *might have been levied upon and sold* under judicial process against him, or otherwise seized, impounded or sequestered . . . .[42] (emphasis added.) ("Act Section 70(a)(5)")

assets of an insolvent debtor is documented as early as the reign of the English King Henry VIII in 1542. Bankruptcy History, *supra* note 33, at 21 & 23.

[39] Bankruptcy Act of 1841, § 3, ch. 9, 5 Stat. 440, 442-43; Bankruptcy Act of 1867, § 14, ch. 176, 14 Stat. 517, 522-23; Bankruptcy Act of 1898, § 70(a), ch. 541, 30 Stat. 544, 565-66; Chandler Act (Bankruptcy Act of 1938), § 70(a), ch. 575, 52 Stat. 840, 883.

[40] *Id.*

[41] 11 U.S.C. §§ 521 & 523(a)(3).

[42] Bankruptcy Act of 1898, § 70(a), ch. 541, 30 Stat. 544, 565-66, as amended by Chandler Act (Bankruptcy Act of 1938), § 70(a), ch. 575, 52 Stat. 840, 883 (emphasis added).

2. *Treatment of Retirement Plans in Bankruptcy Prior to 1978 Bankruptcy Amendments.*

In 1938, Congress enacted I.R.C. amendments which for the first time required that qualified retirement plans expressly prohibit diversion of the assets of a qualified trust for any purpose other than the provision of benefits to plan participants, until all such benefits are fully paid.[43] The Department of Treasury regulations interpreting this provision required that the plan or trust documents implementing a qualified plan:

> must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means.[44]

This requirement has remained a part of applicable Treasury regulations from 1939 until the present.[45]

In 1974, Congress adopted ERISA.[46] ERISA replaced state laws governing retirement plans and provided for a strongly worded nonalienation requirement.[47] ERISA Section 206(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[48] ERISA also amended the I.R.C. to add Section 401(a)(13) which contained similar language and codified the longstanding Treasury Department

[43] Revenue Act of 1938, Pub. L. No. 75-554, § 165, ch. 289, 52 Stat. 447, 518.

[44] Treas. Reg. 101 under the Revenue Act of 1938, § 165-1(d) (1939). *Accord* H.R. Rep. No. 1860, 75th Cong., 3d Sess. 46 (1938).

[45] Treas. Reg. § 1.401(a)-13(b) (1988).

[46] Pub. L. No. 93-406, 88 Stat. 829 (1974).

[47] It is not necessary to resolve the issue of the extent to which state spendthrift statutes are preempted by ERISA to resolve this case. That issue need only be addressed if this Court agrees with the Petitioner that Code Section 541(c)(2) only applies to spendthrift provisions of state law.

[48] ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988).

and Internal Revenue Service interpretations of the "no diversion" rule of I.R.C. Section 401(a)(3).[49] It is clear from the preamble to ERISA [50] and the legislative history of ERISA[51] that this and the other minimum standards imposed on retirement plans by ERISA are intended to protect retirement plan benefits so that participants will actually receive the retirement benefits they have grown to expect.

During the 40 years preceding enactment of the Code, six court decisions construed Act Section 70(a)(5).[52] Four of these decisions predated ERISA.

In 1939, the Fifth Circuit held in *In re Baxter* [53] that retirement annuities that were expressly made nonassignable would not be includable in a bankrupt employee's estate because the property of the debtor was not transferable.

Two decisions reported during the 1940s held that spendthrift provisions protected retirement benefits of bankrupt employees of quasi-government agencies.[54] For example, in *TVA v. Kinzer*,[55] the Sixth Circuit held that a spendthrift provision in a retirement plan that did not satisfy the requirements for protection under applicable state law was excluded from a bankruptcy estate because

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[49] I.R.C. § 401(a)(3); Treas. Reg. § 1.401(a)-13(b) (1988).

[50] ERISA § 2(a), 29 U.S.C. § 1001(a) (1988).

[51] H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 280 (1974), Ways & Means Rep., H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 28 & 66 (1974); House Labor Rep., 120 Cong. Rec. 3977, 3987 (Feb. 25, 1974).

[52] 11 U.S.C. § 110(a)(5) (1970).

[53] 104 F.2d 318 (6th Cir. 1939). *See also Seventy-First Street & Broadway Corp. v. Thome*, 157 A. 851 (N.J. 1932).

[54] *TVA v. Kinzer*, 142 F.2d 833 (6th Cir. 1944) (TVA employee); *In re McManaman*, 50 F. Supp. 869 (N.D. Ill. 1941) (Federal Reserve Board employee). There are other decisions during the pre-ERISA period, which concentrate upon whether specific provisions constitute spendthrift provisions.

[55] 142 F.2d 833 (6th Cir. 1944).

a prohibition against transfer incorporated in rules and regulations promulgated under the Tennessee Valley Authority Act [56] was deemed to have the same force and effect as the statute itself.[57]

The *TVA* decision demonstrates that the Sixth Circuit considered that nonalienation provisions required by a federal law brought pension trusts within the protection of the spendthrift trust provision of Section 70(a)(5) of the Bankruptcy Act of 1898. This result is entirely consistent with the view that the I.R.C. Section 401(a)(13) and ERISA Section 206(d) nonalienation provisions brought retirement plans within the spendthrift trust protections of bankruptcy law in existence prior to the Bankruptcy Code of 1978.

In 1974 the Eighth Circuit held that lump sum retirement plan benefits currently payable to a debtor were included in a bankruptcy estate.[58] However, this decision merely illustrates that retirement benefits cease to be protected once paid.[59]

In *In re Turpin* [60] and *In re Parker*,[61] the Fifth Circuit and the District Court for the Western District of New York interpreted ERISA mandated spendthrift provisions as restrictions on transfer, levy or seizure of the type that prevented retirement plan assets from being treated as a portion of the bankruptcy estate for purposes of Act Section 70(a)(5).

Both cases refer to another theory for excluding future retirement benefits from the bankruptcy estate, which was first enunciated in this Court's decision in *Segal v. Ro-*

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[56] 16 U.S.C. § 832 *et seq.*

[57] 142 F.2d at 837.

[58] *Short v. Girand*, 507 F.2d 425 (8th Cir. 1974) (mechanical plan administration steps necessary for such disbursement had been set in motion).

[59] *Accord Velis v. Kardanis*, 949 F.2d 78, 82-83 (3d Cir. 1991).

[60] 644 F.2d 472 (5th Cir. 1981).

[61] 473 F. Supp. 746 (W.D.N.Y. 1979).

chelle.[62] *Segal* did not involve retirement benefits. However, *Segal* offered guidelines for determining when future payments would be considered "property" of the debtor includable in the bankruptcy estate. In *Segal,* the Court suggested in *dicta* that future payments are not "property" includable in a bankruptcy estate if such future payments are not "rooted in the pre-bankruptcy past" or if such future payments are "entangled with the bankrupt's ability to make an unencumbered fresh start." [63] Both *Turpin* and *Parker* concluded that retirement benefits that are payable in the future are not "property" of the debtor within the meaning of the *Segal* test.

3. *The Bankruptcy Commission's Radical Proposal.*

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States (the "Bankruptcy Commission").[64] The Bankruptcy Commission reported its recommendations in 1973.[65]

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[62] 382 U.S. 375 (1966).

[63] 382 U.S. at 380. In a subsequent decision involving accrued vacation pay, this Court ruled for the debtor based upon the *Segal* test. *Lines v. Frederick,* 400 U.S. 19, 21 (1970) (accrued vacation pay not yet paid). However, vacation pay is not protected by ERISA Section 206(d) or I.R.C. Section 401(a)(13). *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 830 (1988). Code Section 541(a) has effectively repealed the precise result in *Lines,* S. Rep. No. 95-989, 95th Cong., 2d Sess. 82 (1978). This repeal action does not adversely affect the continued usefulness of the *Segal* test in determining whether spendthrift trust property protected by I.R.C. Section 402(a)(13) and ERISA Section 206(d) is "property" for purposes of Section 541. *Id.*

[64] Pub. L. No. 91-354, 84 Stat. 468 (1970).

[65] H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Parts I & II (1973). This Court has expressed a somewhat divided opinion with respect to the usefulness of this Report as legislative history. *Kelly v. Robinson,* 479 U.S. 36, 53 (1986) (no weight). *But see U.S. v. Nordic Village, Inc.,* —— U.S. ——, —— S. Ct. —— (1992) (Stevens & Blackmun, dissenting); *Hoffman v. Conn. Dept. of Income Maintenance,* 492 U.S. 96, 111 (1989). (Stevens & Blackmun dissenting); *Northern Pipeline Construction Co. v. Marathon Pipe Line,* 458 U.S. 50, 117 (1982) (White, Burger & Powell dissenting);

In its report, the Bankruptcy Commission recommended a radical revision of the rules for determining what property is included in the bankruptcy estate. The Bankruptcy Commission recommended a two-step mechanism for determining what property of the debtor would be available for division among creditors:

> *Step One.* Virtually all property of the debtor, including beneficial interests in spendthrift trusts would be initially included in the bankruptcy estate.[66] The Bankruptcy Commission recommended spendthrift trust property be swept into the bankruptcy estate, notwithstanding the existence of exemptions.
>
> *Step Two.* In what it referred to as a "related provision," the Bankruptcy Commission recommended that bankruptcy exemptions be expanded to include a new exemption for qualified retirement plans.[67] The new exemption for qualified plans was designed as a relief valve to mitigate the hardship which could result from inclusion of retirement plan benefits in the estate.

4. *Enactment of Modified Version of the Bankruptcy Commission's Proposal.*

The House and Senate sponsors of the Bankruptcy Code of 1978 initially introduced legislation that reflected this two-step mechanism recommended by the Bankruptcy Commission.[68]

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 205 (1988). The Chamber contends that the Bankruptcy Commission's recommendations with respect to the precise issue before this Court are sufficiently relevant when combined with the subsequent action of the House and Senate to merit this Court's consideration.

[66] Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part I at 197-98 & Part II at 147-48 (1973) (Proposed Section 4-601(b)) (limited exclusion was continued if necessary for current support of the debtor).

[67] *Id.,* Part II, at 150, cmt. 5.

[68] H.R. 10792, 93d Cong., 1st Sess. (Oct. 9, 1973) (Edwards (D. Cal.) & Wiggins (R. Cal.)); H.R. 31 & H.R. 32, 94th Cong., 1st

Although the Senate Judiciary Committee reported, and the full Senate initially passed, a version of the Bill that reflected this two-step mechanism,[69] the final bill enacted by Congress restored the prior treatment of spendthrift trusts as excludable from the initial bankruptcy estate.[70]

Section 541 of the Bankruptcy Code of 1978 followed the Bankruptcy Commission's recommendation in other respects. Most property, other than beneficial interests protected by spendthrift trust provisions, was brought into the bankruptcy estate. The "relief valve" exemption proposal was enacted as Bankruptcy Code Section 522(d)(10)(E).[71]

This drastic change in the proposal assured that the second, dependent step of the mechanism proposed by the Bankruptcy Commission would have little meaning for spendthrift trusts. By accepting the exemption language of Section 522(d)(10)(E) drafted by the Bankruptcy Commission, Congress enacted a vestige of an unenacted two-part mechanism. That provision was drafted to serve as a relief valve to remove from the reach of creditors certain spendthrift trust assets that the original drafters intended to be part of the bankruptcy estate in an unenacted version of the legislation.

This restoration of pre-1978 treatment of spendthrift trusts in the drafting process of the Bankruptcy Code of

Sess. (Jan. 14, 1975) (Edwards (D. Cal.) & Wiggins (R. Cal.)); S. 2565, 93d Cong., 1st Sess. (Oct. 11, 1973) (Burdick (D. N.D.) & Cook (R., Ky.); S. 235 & S. 236, 94th Cong., 1st Sess. (Jan. 17, 1975) (Burdick (D. N.D.)).

[69] S. 2266, 95th Cong., 2d Sess. (1978) (passed in Senate Sept. 7, 1978).

[70] H.R. 8200, 95th Cong., 1st Sess. (Edwards, Butler, Seiberling, Drinan, Volkmer, Beilenson & McClory) (as reported by House Judiciary Comm.) (July 11, 1977). Statement of Floor Manager, Rep. Don Edwards (D., Cal.), during House debates concerning passage of the Conference Report, 124 Cong., Rec. 32399 (1978); *Cf.* S. 2266, 95th Cong., 1st Sess. (DeConcini & Wallop) (Oct. 31, 1977).

[71] 11 U.S.C. § 522(d)(10)(E) (1988).

1978 demonstrates conclusively that retirement plans which qualify as spendthrift trusts are not intended to be part of the bankruptcy estate, notwithstanding the language of Section 522(d)(10)(E).

While there are a few references to the phrase "applicable nonbankruptcy law" in other expressions of legislative history, most such references simply repeat the statutory phrase.[72] However, when the Committees and floor managers of the Bill intended to speak only of state law, they did so.[73] The one reference to state law in conjunction with descriptions of new Section 541 is best interpreted as an illustration of laws included and not an implied exclusion of laws not mentioned.[74] In addition, the Bankruptcy Commission's reference to the relatedness of the qualified plan exemption to its proposal to include spendthrift trusts in a bankruptcy estate[75] makes it clear that the Bankruptcy Commission believed that the reference to "applicable nonbankruptcy law" included a reference to ERISA and I.R.C. nonalienation restrictions.

E. 1984 ERISA Reenactment of Nonalienation.

Congress amended and reenacted ERISA Section 206(d) and I.R.C. Section 401(a)(13) in 1984 to provide a special rule for qualified domestic relations orders.[76] In discussing

[72] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 369 (1977); S. Rep. No. 95-989, 83, 95th Cong., 2d Sess. (1978).

[73] *E.g.*, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 38, 47 & 274-75 (1977); S. Rep. 95-989, 95th Cong., 2d Sess. 6, 51, 74 & 110 (1978); 123 Cong. Rec. 35,452 (1977) (Statement of Rep. Drinan (D. Mass.) regarding bankruptcy exemptions).

[74] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 176 (1977).

[75] Report of Commission on Bankruptcy Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part II, at 150, cmt.5 (1973).

[76] Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified as amended in scattered sections of 26 & 29 U.S.C.). Because of uncertainties regarding the extent of ERISA preemption of state laws governing the division of family assets and family support obligations Congress adopted a limited exception to the nonalienation rules to accommodate reasonable state interests without unduly burdening retirement plans.

this legislation, one of the floor managers in the House, Congressman John Erlenborn, stated that Congress intended to adopt only a limited exception to the nonalienation rule.[77]

F. Petitioner's Interpretation of Section 541(c)(2) is Without Merit.

The Petitioner's view that the Code Section 522(d)(10)(E) exemption for qualified plans adversely affects the availability of Code Section 541(c)(2) protection was first expressed in the *Goff*[78] decision. However, *Goff* did not address the impact of Section 206(d) of ERISA. The *Goff* court purported to concede the validity of bankruptcy exemptions for amounts exempt from garnishment under a limited number of federal statutory nonalienation provisions, but excluded ERISA Section 206(d) and I.R.C. Section 401(a)(13) from the list of those statutes.[79] Recently, this Court pointedly described ERISA Section 206(d) as "consonant with other statutory provisions designed to safeguard retirement income" which the Court then identified in a footnote.[80] The list of federal anti-garnishment statutes contained in that footnote is identical to the *Goff* list.[81]

More importantly, the Petitioner's argument fails to justify abandonment of the plain meaning of Section 541. The Petitioner wholly fails to address the fact that the Section 522(d)(10)(E) qualified plan exemption is a vestige of an unenacted two-part mechanism proposed by the Bankruptcy Commission.

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[77] 130 Cong. Rec. H4251-52 (May 22, 1984) (Statement of Rep. Erlenborn (R., Ill.)).

[78] *In re Goff*, 706 F.2d 574 (5th Cir. 1983).

[79] 706 F.2d at 583.

[80] *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 371-72 & n.13 (1990).

[81] 706 F.2d at 583.

II. EXCLUSION OF RETIREMENT PLAN ASSETS AND BENEFITS FROM THE BANKRUPTCY ESTATE IS CONSISTENT WITH THE OBJECTIVES OF THE BANKRUPTCY CODE AND HARMONIZES THE BANKRUPTCY CODE WITH THE OBJECTIVES OF ERISA AND THE I.R.C.

Future retirement benefits are "entangled with the bankrupt's ability to make an unencumbered fresh start." [82] This Court should reaffirm the traditional harmony between national retirement policy and national bankruptcy policy by affirming the decision below. Such a ruling will make it clear to creditors that they should not expect the windfall of access to a debtor's retirement benefits. The Chamber contends that creditors currently have no such expectation. A ruling by this Court which focuses upon the absence of reasonable creditor expectations would be an appropriate reformulation and clarification of the two-part *Segal* test of whether future retirement benefits are "rooted in the pre-bankruptcy past." [83]

A. National Retirement Policy Objectives of I.R.C. and ERISA.

Surveys of personal bankruptcies in 1981 and 1989 illustrate that about two-thirds of the surveyed households were before the Bankruptcy Court because of extraordinary expenses or the interruption of income due to job loss, excessive medical expenses associated with serious illness, or separation or divorce.[84]

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[82] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). *See supra* note 63 for a discussion regarding the limited usefulness of the *Segal* test following enactment of Code Section 541.

[83] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966); *See* notes 60-63 *supra* & note 92 *infra* & accompanying text.

[84] *Compare The Bankruptcy Jungle*, 79 Credit World 24, 26 (March/April 1991) (report of Visa/U.S.A. 1989 Bankruptcy Survey) *with* Warren, *A Growing Army of Bankrupts*, 79 Credit World 18, 20 (Sept/Oct. 1990) (report of in depth National Science Foundation study of 2,200 consumer bankruptcies in Southern California in 1981).

The picture that emerges is one of industrious, honest, middle-class Americans who have been caught up in major shifts in the economy or who have suffered personal hardships beyond their capacities. Where significant retirement assets are at stake, these debtors have worked long enough to accumulate vested benefits. By and large, they are older than bankrupt debtors without retirement benefits. Many may be close to retirement.

Retirement benefits are designed to replace wages during the debtor's retirement years. A typical retiree may expect to live for a period 15 to 20 years with diminished income.[85] When honest, hardworking debtors face financial difficulties, their instincts are to pay their creditors at all costs. Many retirement plan participants would use their qualified plan savings for this purpose if they could. But that is not what qualified retirement plans are all about.

Employer-sponsored retirement plans are the product of an historic partnership between the public and the private sectors. The tax policies favoring such plans represent one of the finest examples of successful domestic policy implementation.[86] Our national retirement policy, as embodied in ERISA and the I.R.C. is designed to reduce the burdens of government by encouraging employers to pay for the retirement living costs of their former employees.[87] This incentive has worked well because it

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[85] *See* Atchley, *The Sociology of Retirement* 74-86 (1976); Chen, *Economic Status of the Aging*, in *Handbook of Aging and the Social Sciences* 641-65 (1985); Crystal, *America's Old Age Crisis* 51-58 (1982). *See also* Treas. Reg. § 1.72.9, Table 1 (1986).

[86] *See Public Policy & Private Pension Programs—A Report to the President on Private Employee Retirement Plans* 2 (1965) [hereinafter cited as President's Report I]; President's Commission on Pension Policy, *Working Papers; Income Security Programs; Past, Present and Future* 3-33 & 51 (Oct. 1980) [hereinafter cited as Past, Present & Future].

[87] Prior to ERISA, private plans were viewed as a supplement to the modest benefits available through Social Security, President's Report I, *supra* note 86; Berstein, *The Future of Private Pensions* 150 & 155-57 (1964); McGill, *Preservation of Pension Bene-*

gives focus to employers' natural instincts of gratitude and obligation to those who have provided faithful service.

The nonalienation provision of I.R.C. Section 401(a)(13) assures that the tax incentives extended to qualified plans achieve the intended purpose. The Internal Revenue Service has interpreted the nonalienation rule as requiring imposition of the Draconian penalty of plan disqualification where a plan complies with a demand by a bankruptcy trustee to turn over plan assets held for the benefit of a bankrupt plan participant.[88] This policy judgment was reconfirmed in 1974 when a similar spendthrift requirement was included in ERISA Section 206(d).

At the time ERISA was adopted there was no basis for serious concern that bankruptcy law would conflict with this mandatory plan design feature.[89] Creditors are aware that retirement benefits are subject to nonalienation restrictions. Because of such restrictions, creditors simply have had no history of reliance upon retirement assets as a source for repayment of debts.[90]

B. Role of Retirement Benefits in Bankruptcy Policy.

Bankruptcy courts have traditionally respected the nonalienation rules applicable to retirement benefits.

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fit Rights 36 & 63 (1973). For more recent confirmation of this national retirement policy, *see* President's Commission on Pension Policy, *Final Report* (Feb. 1981); *President's Commission on Pension Policy, Working Papers: In-Kind Benefit Programs and Retirement Income* 9-40 (Oct. 1980); President's Commission on Pension Policy, *Working Papers: Income of the Retired—Levels and Sources* 27-70 (Oct. 1980); *Past, Present & Future*, *supra* note 86, at 3-33 & 37-41; President's Commission on Pension Policy, *Working Papers; Retirement Income Goals* 31-34 & 49-50 (March 1980); President's Commission on Pension Policy, *Working Papers: Universal Private Pension Coverage* 8-9 (March 1980); EBRI, *The Changing Profile of Pensions* xxv, 3-6 & 165 (1985).

[88] Cf. Priv. Ltr. Rul. 8131020, CCH Pens. Plan Guide, at ¶ 17 373B (1981), (Chapter 13 proceeding). *But see*, *Central States Health & Welfare Pension Fund v. Stephenson*, 41 Bankr. 893 (D.S.C. 1984).

[89] *See* notes 43-63 *supra* & accompanying text.

[90] *See* notes 93-104 *infra* & accompanying text.

This harmony between bankruptcy law and the I.R.C. and ERISA nonalienation rules also served the national policy objectives of the Bankruptcy Code. From the earliest days of our republic it has been clear that the first and most basic policy of bankruptcy is to provide debtors who have not defrauded creditors with a "fresh start." [91] This purpose is well served if the debtor's qualified retirement plan assets remain intact. Most employees can only accumulate sufficient retirement assets during a whole career of retirement savings. If retirement assets can be stripped away in personal bankruptcies, many workers will be condemned to employment dependency well past age 65.

Another major policy objective of the Bankruptcy Code is addressed by the second element of the *Segal* test. If a future right to property is "rooted in the pre-bankruptcy past," [92] then creditors may be said to have a reasonable expectation of access to such property in bankruptcy. The Chamber recommends that this Court reformulate this element of the Segal test as a "reasonable creditor expectation" test. Stated in another way, the Bankruptcy Code should protect the reasonable expectation of creditors regarding the repayment of the debts, to the extent available assets permit such protection. As described above, permitting creditors to reach retirement plan assets would result in a windfall beyond the expectation of reasonable lenders.

Modern consumer credit practices have evolved over the past 75 years.[93] Over that period the consumer credit

[91] The Constitution granted Congress the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.' Art. I, § 8, cl. iv. This provision and the commentary in the Federalist Papers have been construed as evidence that "relief from debt was considered important and desirable in that early and undeveloped stage of our country's commerce." Bankruptcy History, *supra* note 33, at 6.

[92] *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). *See* notes 61-63 & 82-83 *supra* & accompaning text.

[93] For description of consumer finance practices before enactment of the Code, *see* National Consumer Finance Ass'n, *The Consumer Finance Industry* 3 (1962) (origins and evolution of consumer finance industry from 1916 to early 1960's) [hereinafter cited as Finance Industry I]. See also, Chapman & Shay. *The Consumer Finance Industry* 2, 3, 14 & 15 (1967) (post World War II through mid 1960's) [hereinafter cited as Finance Industry II]; Hayes, *Bank Lending Policies* 32-49 (1977) (1950 through mid 1970's) [hereinafter cited as Lending Policies].

industry has grown to rely upon risk management safeguards that place little or no reliance upon retirement benefits as a source of repayment of loans. Consumer credit consists of secured purchase money credit, unsecured noninstallment credit and unsecured installment credit.[94]

Creditors with valid purchase money security interests may continue to assert their claims despite the power of bankruptcy trustees to avoid most other liens or security interests.[95] Purchase of personal property such as automobiles, large appliances and furniture are often handled in this fashion.[96] The purchaser often makes a significant down payment which improves the chances that the collateral will be sufficient.[97] Thus, secured purchase

[94] Federal Reserve, *Banking and Monetary Statistics: 1941-1970*, 1053-76 (1976) [hereinafter cited as Federal Reserve Statistics]; Redding & Knight, *Dun & Bradstreet Handbook of Credits and Collections*, 8-10 (1974) [hereinafter cited as Dun & Bradstreet Handbook]. Unique credit arrangements which do not fit these categories are not significant components of consumer credit.

[95] Creditors with such security interests may assert such claim to obtain a preferential recovery of their debts out of the proceeds of the sale of such property in bankruptcy. 11 U.S.C. §§ 506(a) & 552 (1988).

[96] Purchase money credit also includes mortgage loans.

[97] Conard, *The Behavior of Interest Rates* 25-27 (1966); G. Weil, *The Consumer's Guide to Banks* 157-59 (1975). Mortgage-loans ordinarily bear a lower rate of interest than personal property purchase money credit because real estate cannot be moved and because it is less likely to depreciate as much as personal property. *Cf.* Holmes & Shedd, *Practical Guide to the Law of Secured Lending* 5-7 (1986); Vidger, *Borrowing and Lending on Residential Property* 35-36 (1981). Local government title registration systems protect a diligent mortgage lender against

money lending practices demonstrate that creditors extending such credit do not rely upon a debtor's future retirement benefits as a potential source of repayment of such debt.

Noninstallment debt is usually unsecured.[98] With the exception of term loans from banks and other lenders, such credit primarily consists of charge cards, retail charge accounts and service credit.[99] Noninstallment debt, other than bank and other term loans, usually involves a 30-day repayment obligation.[100] Thus, the short term nature of such noninstallment debt disproves any contention that creditors extending such credit rely upon future retirement benefits as a source of payment.

Other than term loans, the only category of unsecured consumer credit which is designed to be in place over an extended period of time is installment debt. Unsecured installment debt consists of credit card and retail revolving charge accounts.[101] Of these, only term loans are extended by lenders with significant personal exposure to the debtor.[102] The high interest rates charged on credit card balances are intended to compensate the institutions extending such credit in advance for the risks of default, which are viewed as merely a cost of doing business.[103]

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fraudulent sales of the property. Automobile registration systems offer similar protection but the risk of rapid loss of value due to depreciation, uninsured damage or theft require that lenders require faster repayment and a higher interest rate.

[98] *See generally* Finance Industry II, *supra* note 93, at 23.

[99] Federal Reserve Statistics, *supra* note 94, at 1054-56, 1072-76 & 1081; Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[100] Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[101] Federal Reserve Statistics, *supra* note 94, at 1054-69 & 1081; Dun & Bradstreet Handbook, *supra* note 94, at 8-9.

[102] Term loans are often limited to existing customers. This familiarity leads to greater creditor confidence. As a result, such loans bear a lower rate of interest than credit cards and revolving charge accounts. *See* Taylor, *Consumer Lending* 142-45 (1983).

[103] Schweikert, *Encyclopedia of American Business History and Biography: Banking and Finance 1913-1989*, at 66-68 (1990);

The risk management practices of banks extending term loans and of credit card lenders are very similar and place an emphasis on factors unrelated to the future retirement benefit entitlements of borrowers. These lending practices stress income, liquid assets and personal factors that have been found to be good predictors of timely repayment.[104] Little or no attention is devoted to future assets or future income such as retirement benefits. Creditors just do not rely upon retirement plan assets in extending credit unless such benefits are already in pay status.

C. Harm Caused by Recent Creditor Efforts to Reach Retirement Benefits.

Despite a history of harmony between national retirement policy and national bankruptcy policy, serious concerns have arisen among the Chamber's members as a result of recent attempts of aggressive creditors to capture just such a windfall. Creditors were encouraged in this effort by the 1983 *Goff* decision.[105] Creditors have often failed in these efforts. But they have won enough judicial skirmishes that they have confused the state of the law and encouraged other creditors to make similar claims. The result has been an explosion of new creditor claims in the past two to five years. In fact, one of the Chamber's member companies maintains a qualified re-

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Lending Policies, *supra* note 93; Sullivan & Worden, *Value Creating in a Credit Card Portfolio*, 13 J. of Retail Banking 19 (Summer 1991); Sullivan & Worden, *Bankruptcy in a Bank Credit Card Portfolio*, 13 J. of Retail Banking 33 (Winter 1991); Gullo, *Back-Office Costs Pinching Banks' Credit Card Profits*, American Banker, at 1 & 3 (Nov. 22, 1991); Kantrow, *Problems Aside, Credit Cards Retain Luster*, American Banker, at 1 & 6 (May 2, 1991). *Cf.* Lending Policies, *supra* note 93, at 181-82.

[104] Lending Policies, *supra* note 93, at 181-96. *See also*, Seder, *Credit And Collections* 26-37 (1977) (credit evaluation factors); Chandler & Parker, *Predictive Value of Credit Bureau Reports*, 11 J. Retail Banking 47 (1989); Overstreet & Kemp, *Managerial Control on Credit Scoring Systems*, 8 J. Retail Banking 79 (1986).

[105] *In re Goff*, 706 F.2d 574 (5th Cir. 1983).

tirement plan that is now facing 85 bankruptcy cases in which creditors of plan participants are seeking to recover plan assets. If this trend continues, such claims will represent a serious and costly administrative burden for plans, plan sponsors and the bankruptcy courts.[106]

National retirement policy assumes that participants will accumulate retirement benefits from three sources, Social Security, employer sponsored retirement plans and personal savings.[107] Social Security only provides a minimal safety net. Since 1942, nondiscrimination limitations were imposed to assure that private retirement plans operate for the benefit of lower paid employees.[108] These nondiscrimination rules have been made progressively more stringent over the intervening years.[109]

Throughout this period it was also recognized that the combination of Social Security and employer sponsored plans would be insufficient to meet the retirement needs of mose employees.[110] It was recognized that retirement security also would require personal savings.[111] This

[106] Because of the threat of disqualification, plans must resist creditor claims. For example, one Chamber member has estimated that a plan disqualification which could result if it cooperated with the efforts of bankruptcy trustees to reach pension assets would cost over $32 million per year in additional corporate income taxes and would trigger income taxation of the earnings on the plan's assets. The plan has assets valued at $7 billion and its annual earnings average almost $750 million. The plan sponsor is contesting efforts of a bankruptcy trustee in the Eastern District of Missouri to reach benefits payable 29 years in the future. Even if the bankruptcy trustee prevails, creditors may not gain anything. The pension remains subject to loss if the participant dies before benefits are paid.

[107] *Supra* notes 86-87 & accompanying text.

[108] H.R. Rep. No. 2333, 77th Cong., 2d Sess. 50-51 (1942); Hearings on Revenue Revision of 1942 Before House Comm. on Ways and Means, 77th Cong., 2d Sess. Pt. I at 1004-05 (1942).

[109] *E.g.*, Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[110] *Supra* notes 86-87 & accompanying test.

[111] *Supra* notes 86-87 & accompanying text.

"three legged stool" approach has been reexamined repeatedly during the intervening years and has been repeatedly reconfirmed.[112]

A working man or woman who experiences bankruptcy will emerge without personal savings. If the debtor is young without significant Social Security credits or employer sponsored benefits, he or she may still accumulate such credits and benefits through years of diligent efforts. However, an older worker without a significant future period of strength, energy and good health will simply be unable to replace either of the two remaining minimum components of his or her retirement income. For this reason both Social Security benefits and employer sponsored retirement benefits have long been viewed as excluded from the estate of a bankrupt debtor. This permits debtors to rely upon receiving a future income when they can no longer work. This assures that debtors who have accumulated credits under retirement plans will not have to depend upon public assistance or other assistance for the aged or infirm.

III. THERE IS NO BASIS FOR DENYING BANKRUPTCY CODE SECTION 541(c)(2) PROTECTION ON ACCOUNT OF A PLAN PARTICIPANT'S COMPENSATION LEVEL OR STATUS.

There is no basis in Section 541 of the Bankruptcy Code of 1978 to treat bankrupt debtors less favorably based upon their pre-bankruptcy status or earnings, or based upon the extent of their post-bankruptcy needs. This silence is particularly important because prior to enacting Section 541 in its present form Congress considered a proposed version of that Section which would have limited the spendthrift trust exclusion to amounts which are necessary.[113]

[112] *Supra* notes 86-87 & accompanying text.

[113] *Compare*, Code § 541(c)(2) with S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, (1978) *and* Report of Commission on Bankruptcy

There are already strict I.R.C. contribution and benefit limitations applicable to highly compensated employees and officers or owners of a plan sponsor.[114] Other provisions of the IRS impose strict nondiscrimination rules on qualified retirement plans.[115] Retirement plans which do not take advantage of the tax advantages of the qualification rules may be designed to favor highly paid employees, officers or business owners. However, these plans, referred to as nonqualified deferred compensation plans and excess plans, do not benefit from the protection of the nonalienation provisions of I.R.C. Section 401(a)(13) or ERISA Section 206(d).[116] Thus, by operation of the I.R.C., Congress has already limited the availability of the Section 541 spendthrift trust protections to highly compensated employees, officers and owners of plan sponsors.

This Court should not read into Section 541 a provision Congress considered and rejected in order to impose new limits on the availability of Section 541 to highly paid employees, officers and owners when Congress has chosen another mechanism for achieving the same objective.

Laws, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. Part II, 147-48 (Proposed Section 4-610(b)).

[114] *E.g.*, I.R.C. §§ 401(k), 401(m), 415 & 416.

[115] *E.g.*, I.R.C. §§ 401(a)(4), 401(a)(5), 401(k), 401(m) & 416.

[116] Such plans are not qualified plans subject to I.R.C. Section 401 and are expressly exempt from coverage under Part 2 of ERISA, including ERISA Section 206(d), 29 U.S.C. § 1056(d) (1988). ERISA §§ 4(b)(5) & 201(2), 29 U.S.C. §§ 1003(b)(5) & 1051(2)(1988).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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March 31, 1992

No. 91-913

In The

Supreme Court of the United States

October Term, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF BY *AMICUS CURIAE,* ELDON S. REED AND BRIEF BY *AMICUS CURIAE,* ELDON S. REED IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE *AMICUS* BRIEF BY *AMICUS CURIAE,* ELDON S. REED

Eldon S. Reed ("Reed") hereby requests this Court for leave to file the accompanying proposed *amicus* brief in support of Joseph B. Shumate, Jr., the Respondent in this case ("Shumate"). Reed sought consent to file this *amicus* brief from the respective counsel for John R. Patterson, Trustee ("Patterson") and Shumate. Shumate consented to the *amicus* brief but Patterson refused consent.

Reed is the debtor/appellant in *In re Reed* currently pending before the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") as Case No. 90-15874, which case involves issues similar to the issues before this Court. The pending *Reed* case includes additional

considerations which may assist the Court in determining whether the retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. The decision reached by this Court in this case will have a direct impact on the *Reed* case pending before the Ninth Circuit. Reed wishes to present these additional considerations to this Court by way of the accompanying proposed *amicus* brief because Reed does not believe these considerations have been or will be addressed by the parties even though they are crucial for this Court's analysis and decision.

Counsel for Reed has reviewed Patterson's Petition for Writ of Certiorari, Shumate's Brief in Opposition to Petition for Writ of Certiorari and Petitioner's Reply Brief (the "Certiorari Pleadings") and, based on a reading of these Certiorari Pleadings, believes that the following matters which are significant to this Court's analysis and decision will not be fully presented by the parties to this Court.

First, recent cases issued by the Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits have all held that a bankrupt debtor's retirement benefits are protected from creditors of the estate. The above Circuits had the benefit of recent decisions by this Court that helped clarify portions of the analysis. While the above Circuits did not follow the same analysis in reaching their results, their opinions achieved the same effect – the protection of a debtor's retirement benefits from creditors. Several of the above Circuits' cases were not discussed in the Certiorari Pleadings, yet these cases provide additional insight and analysis of the issues that will be beneficial to this Court.

Next, the parties also have not addressed the significant Congressional policy considerations behind ERISA and the Bankruptcy Code, what body should make exceptions to Congressional policy, what economic costs are involved and who ultimately must pay such economic costs.

Third, there are two steps in determining the larger question of whether retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. Initially, this Court should determine whether the term "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) encompasses ERISA § 206(d)(1). If this term does include ERISA § 206(d)(1), retirement benefits subject to ERISA are *excluded* from the debtor's bankruptcy estate and remain protected from creditors. No further analysis would be necessary for ERISA qualified retirement benefits.

If this Court determines that "applicable nonbankruptcy law" does not include ERISA § 206(d)(1), the Court should then determine whether the retirement benefits are *exempt* from creditors pursuant to Bankruptcy Code § 522(b). There are two specific subissues that must be analyzed in determining whether retirement benefits are exempt from creditors. These issues are (1) whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified plans, and (2) whether Bankruptcy Code § 522(b) elevates state exemption statutes to the status of federal law thereby saving the state statutes from ERISA preemption.

Reed's proposed *amicus* brief provides a useful and meaningful scrutiny of the issues of exclusion and exemption of a debtor's retirement benefits. Based on the above, Reed requests that this Court grant leave for Reed to file his proposed *amicus* brief for consideration by this Court.

DATED this 31st day of March, 1992.

By ______________________

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BRIEF BY *AMICUS CURIAE*, ELDON S. REED IN SUPPORT OF RESPONDENT

HISTORY AND INTEREST OF THE AMICUS CURIAE

The *amicus curiae* Eldon S. Reed filed his bankruptcy petition on May 20, 1988. He was a participant in an employer-sponsored pension plan which was qualified pursuant to ERISA and the Internal Revenue Code. In his Schedule of Assets filed with the Bankruptcy Court for the District of Arizona (the "Arizona Bankruptcy Court"), *amicus curiae* claimed an exemption pursuant to Bankruptcy Code § 522(b) and Ariz. Rev. Stat. Ann. § 33-1126 for all of his retirement benefits in the pension plan.

The bankruptcy trustee filed an objection to *amicus curiae's* claim for an exemption of his retirement benefits.

The matter was heard by the Arizona Bankruptcy Court on October 2, 1989. The Arizona Bankruptcy Court decided against the *amicus curiae* and in favor of the bankruptcy trustee shortly thereafter.

The *amicus curiae* appealed the Arizona Bankruptcy Court decision to the United States District Court for the District of Arizona (the "Arizona District Court"). The Arizona District Court affirmed the Arizona Bankruptcy Court decision and the *amicus curiae* appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). The Ninth Circuit affirmed the Arizona District Court and the Arizona Bankruptcy Court decisions on December 11, 1991. The *amicus curiae* then filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* with the Ninth Circuit, which petition is currently pending.

The resolution of this case will have a direct impact on the *amicus curiae's* case now pending before the Ninth Circuit. Several questions of law in this case are involved in *amicus curiae's* case in the Ninth Circuit. The *amicus curiae's* case also involves additional alternative legal arguments which *amicus curiae* believes are relevant and beneficial to this Court in its resolution of the general question of whether pension benefits of a debtor in bankruptcy are protected from creditors of the debtor's bankruptcy estate.

SUMMARY OF THE ARGUMENT

This Court's analysis in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), and *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), has called into question the rationale supporting *Goff v. Taylor*, 706 F.2d 574 (5th Cir. 1983), and its progeny, *In re Graham*, 726 F.2d 1268 (8th Cir. 1984), *Daniel v. Security Pac. Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985). *Goff* and its progeny concluded that the retirement benefits of a debtor in bankruptcy were not protected from creditors of the debtor's bankruptcy estate based upon a review of the legislative history to Bankruptcy Code §§ 522(b)(2) and 541(c)(2). The "plain meaning" rule and simple principles of statutory construction were violated by *Goff* and its progeny. Since this Court's decisions in *Guidry* and *Ron Pair*, several Circuit Courts have held that the retirement benefits of a debtor in bankruptcy are protected from creditors and have rejected the thought process of *Goff* and its progeny. Yet a split in the Circuits still remains and this Court can resolve the analysis once and for all rejecting *Goff* and its progeny.

Congress has directly, expressly and consistently protected retirement benefits by placing anti-alienation or exemption provisions in numerous statutes involving retirement benefits. Examples of statutes with anti-alienation or exemption provisions include ERISA, the Internal Revenue Code, the Bankruptcy Code, the Social Security Act, Civil Service Retirement Act and the Railroad Retirement Act. ERISA's anti-alienation provisions reflect a considered pattern of Congressional policy choices to safeguard a means of income for pensioners and their

families. If Congress had wanted to exclude any form of alienation, it could have done so expressly just as it did with qualified domestic relations orders.

Following this Court's "plain meaning" rule for statutory construction in *Ron Pair*, "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) must be read to include ERISA's anti-alienation provision. Consequently, ERISA qualified retirement benefits are excluded from a debtor's bankruptcy estate.

In addition, this Court's logic in *Ron Pair* and *Guidry* dictates that ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2), thereby exempting ERISA qualified retirement benefits of a debtor from the creditors of the debtor's bankruptcy estate.

Considering this Court's findings in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), and Congress' desire to work with the states in creating exemptions for debtors that allow debtors to emerge from bankruptcy with sufficient possessions for a fresh start, state exemption statutes protecting retirement benefits are saved from ERISA preemption by Bankruptcy Code § 522(b) and ERISA § 514(d).

ARGUMENT

I. SEVERAL RECENT DECISIONS BY THIS COURT AND VARIOUS CIRCUITS HAVE UNDERMINED THE VIABILITY OF *GOFF* AND ITS PROGENY

This Court's analysis in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (hereinafter "*Guidry*"), and *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (hereinafter "*Ron Pair*"), has called into question the rationale supporting *Goff v. Taylor*, 706 F.2d 574 (5th Cir. 1983) (hereinafter "*Goff*"), *In re Graham*, 726 F.2d 1268 (8th Cir. 1984) (hereinafter "*Graham*"), *Daniel v. Security Pac. Nat'l Bank*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (hereinafter "*Daniel*"), and *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985) (hereinafter "*Lichstrahl*") (all four cases hereinafter referred to as "*Goff* and its progeny").

Goff and its progeny concluded that a review of the legislative history to Bankruptcy Code § 541 was necessary to determine whether "applicable nonbankruptcy law" referred only to state law or to both state and federal law. In interpreting the legislative history, these courts concluded that because the legislative history to Bankruptcy Code § 541 mentioned only state spendthrift trust law, "applicable nonbankruptcy law" must include *only* state spendthrift trust law.

They also looked to the legislative history of Bankruptcy Code § 522 to determine whether ERISA is "other federal law." The legislative history to Bankruptcy Code § 522 contains an illustrative list of examples of "other federal law" but ERISA is not included in the list. While the list is only illustrative, the courts still concluded that

Congress must not have intended ERISA to be "other federal law" for purposes of Bankruptcy Code § 522.

This Court in *Ron Pair* clarified a court's role in statutory construction by developing the "plain meaning" rule. The plain meaning rule provides that if a statute is clear on its face, the analysis stops at the clear meaning of the statute. *Ron Pair* and the plain meaning rule are in direct conflict with the statutory construction undertaken by *Goff* and its progeny.

This Court in *Guidry* also made it clear that ERISA provisions are superior to creditors' rights, and that the ERISA anti-alienation provision is comparable to other federal anti-alienation provisions in the illustrative list included as a part of the legislative history to Bankruptcy Code § 522(b). *Goff* and its progeny again run contrary to this Court's rulings.

Since this Court issued its decisions in *Ron Pair* and *Guidry,* the overwhelming majority of circuits to address the question currently before this Court have held that retirement benefits of a debtor in bankruptcy are protected from the creditors of the debtor's bankruptcy estate. The Third, Fourth, Sixth and Tenth Circuits have issued decisions directly in conflict with *Goff* and its progeny. The four Circuits addressed the meaning of "applicable nonbankruptcy law," discarded the *Goff* rationale in favor of this Court's plain meaning rule found in *Ron Pair,* and held that ERISA is "applicable nonbankruptcy law." *Velis v. Kardanis,* 949 F.2d 78 (3rd Cir. 1991) (hereinafter "*Velis*"); *In re Moore,* 907 F.2d 1476 (4th Cir. 1990) (hereinafter "*Moore*"); *In re Lucas,* 924 F.2d 597 (6th Cir. 1991), *cert. denied, Forbes v. Holiday Corp. Sav. and Retirement Plan,* 111 S. Ct. 2275 (1991) (hereinafter "*Lucas*"); *In re Harline,* 950 F.2d 669 (10th Cir. 1991), *petition for cert. filed,* ___ U.S.L.W. ___ (U.S. March 4, 1992) (No. 91-1412) (hereinafter "*Harline*").

The Fifth Circuit, which originally issued the *Goff* decision, and the Eighth Circuit, which originally issued the *Graham* decision, recently issued decisions protecting bankrupt debtors' retirement benefits from creditors. *In re Volpe,* 943 F.2d 1451 (5th Cir. 1991); *In re Dyke,* 943 F.2d 1435 (5th Cir. 1991); *In re Vickers,* ___ F. 2d ___, 60 U.S.L.W. 2487 (8th Cir. Jan. 24, 1992). The new decisions hold that ERISA does not preempt state exemption statutes.

The clear trend of the Circuits has been to protect retirement benefits from creditors. One exception has been the Ninth Circuit where the *amicus curiae* resides and which recently affirmed its original *Daniel* decision in *Pitrat v. Garlikov,* 947 F.2d 419 (9th Cir. 1991), and *In re Reed,* 951 F.2d 1046 (9th Cir. 1991). Both debtors have filed Petitions for Rehearing and Suggestion for Rehearing *En Banc* and both cases are currently pending before that Circuit.

The recent trend of cases in the Circuits clearly shows the effort by courts to harmonize federal bankruptcy law with ERISA and the Internal Revenue Code. Judge Fletcher from the Ninth Circuit in a concurring opinion acknowledged that the Ninth Circuit's decisions in this area do not harmonize federal bankruptcy law and ERISA law and undercut the purposes of ERISA. *In re Kincaid,* 917 F.2d 1162, 1170 (9th Cir. 1990) (*Fletcher,* concurring).

In light of the recent decisions by this Court, as well as the recent well-reasoned decisions by the Third,

Fourth, Fifth, Sixth, Eighth and Tenth Circuits, this Court should reject *Goff* and its progeny and rule that the retirement benefits of a debtor in bankruptcy are protected from creditors just as those same benefits would be protected if the debtor had not filed bankruptcy.

II. CONGRESSIONAL POLICY CONSIDERATIONS DICTATE PROTECTION OF RETIREMENT BENEFITS

Three separate statutes enacted by Congress generally address the issue of retirement benefit protection, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Internal Revenue Code ("IRC"), and the Bankruptcy Code ("Bankruptcy Code"). Each of these statutes clearly provides protection for retirement benefits from creditors' claims. ERISA § 206(d); IRC § 401(a); Bankruptcy Code § 522. The *amicus curiae* is unaware of any statutes enacted by Congress which specifically allow creditors to pursue retirement benefits. In fact, in every situation when a statute has been enacted by Congress dealing with retirement benefits, Congress also included an anti-alienation or protection clause to preclude collection from retirement benefits. *See Social Security Act*, 42 U.S.C. § 407; *Civil Service Retirement Act*, 5 U.S.C. § 8346(a); *Railroad Retirement Act*, 45 U.S.C. § 231m(a).

The majority of state legislatures also have drafted exemption statutes for their states. With Congress and the

majority of state legislatures providing pension plan protection in several different statutes, one can only conclude that Congress and the states have a serious interest in protecting retirement benefits for their intended use – income for retired individuals.

It is not surprising that Congress and the states wish to protect retirement income. The cost to support individuals during their retirement years is enormous. According to information provided by the Employee Benefit Research Institute, qualified retirement plans in America held approximately $2.329 trillion in assets in 1988. Of this amount, $1.504 trillion was held in private plans while $825 billion was held in federal, state and local retirement plans. Contributions to qualified retirement plans in 1988 exceeded $183 billion while benefit payments from these plans equaled approximately $196 billion. These numbers continue to grow each year. For 1990, individuals contributed $267.5 billion into the social security trust fund and benefit payments from the social security trust fund equaled $223 billion.[1] Approximately twenty-eight percent (28%) of the federal government's expenditures in 1991 constituted benefits for retirees.[2]

With such a large number of dollars sitting in pension plans, creditors have become creative in an attempt to break down the protections provided by Congress.

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[1] The above statistics are from the EBRI Databook on Employee Benefits, second edition, Joseph S. Piacentini and Jill Foley, eds. (Washington D.C., forthcoming).

[2] U.S. Budget, Director's Introduction (and overview tables) Part One-25.

However, the decisions of courts that have allowed creditors in bankruptcy access to retirement benefits have given creditors an unexpected windfall.

Pursuant to ERISA, qualified pension plan benefits are supposed to be protected from the beneficiary's creditors. Thus, creditors historically have not taken the individual's assets in a qualified retirement plan into account when assessing the credit risk and deciding to issue credit. In essence, under *Goff* and its progeny, creditors now will receive payment from a source they otherwise were not supposed to be entitled to and from a source they did not expect to be available when they originally assessed the risk of extending credit. As a result, the risk of extending credit has shifted from the creditor, who already calculated the cost of the risk into the credit price, to someone not prepared to pay for the cost from retirement funds. The individual who lost the anticipated retirement money must begin to save again or, more than likely, the cost will shift to the general public who must fund greater governmental expenditures to help support these individuals through their retirement years.

Creditors have been successful in confusing an otherwise clear area of the law through the use of unorthodox and ill-founded reasoning. In effect, these individuals argue that while each of the various statutes applicable to the issue provides for protection of retirement benefits from creditors, taken together these statutes create a domino effect and cancel each other out. Their argument, reduced to an equation, is that one exemption in ERISA plus one exemption in the IRC plus one exemption in the

Bankruptcy Code plus one exemption in a state statute actually equals no exemption, or better stated:

$$1 + 1 + 1 + 1 = 0.$$

They support this result by ignoring the plain and simple language of the various statutes involved and looking directly to the legislative history of these statutes. Then they take simple examples in the legislative history and turn them into absolutes. This is an anomaly which Congress did not intend to create. The intent of Congress, as clearly expressed in any statute it created relating to retirement benefits, has been to provide protection for a debtor's retirement benefits. Creditors say this result is unfair and inequitable because it allows a debtor to retain a pool of money while at the same time receiving a forgiveness of a debt.

This Court in *Guidry* stated that it is inappropriate to approve any generalized equitable exception to ERISA's prohibition on the assignment or alienation of pension benefits:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

493 U.S. at 376. This Court went on to explain how Congress did amend the anti-alienation provision in ERISA in 1984 to exclude qualified domestic relations orders in § 104(a) of the *Retirement Equity Act of 1984*. *Id.*

at 376 n. 18. If Congress had wanted to exclude any other form of alienation it could have done so at that time.

This Court cautioned that, as a general matter:

> [C]ourts should be loath to announce equitable exceptions to legislative requirements to prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended *only* in the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable.

Id. at 376-77 (emphasis in original).

What some creditors have tried to accomplish with their strained analysis of the legislative history to Bankruptcy Code §§ 522(b) and 541(c) is an equitable exception to the anti-alienation provision in ERISA. However, "it is up to Congress to amend ERISA, not the courts. If creditors and courts find it objectionable to permit persons . . . to shelter large sums of money in ERISA tax-qualified plans, their appeal should be to Congress." *In re Komet*, 104 B.R. 799, 816 (Bankr. W.D. Tex. 1989). And, while "there may be a natural distaste for the result . . . [t]he statute, however, is clear." *Guidry*, 493 U.S. at 377.

III. A BANKRUPT DEBTOR'S RETIREMENT BENEFITS ARE EXCLUDABLE OR EXEMPT

A simple two-step analysis of the issues affecting retirement benefits of debtors in bankruptcy should be used by this Court. First, this Court should determine whether the term "applicable nonbankruptcy law" found in Bankruptcy Code § 541(c)(2) encompasses ERISA § 206(d)(1). If this term does include ERISA § 206(d)(1), then retirement benefits subject to ERISA are *excluded* from the debtor's bankruptcy estate and remain protected from creditors. No further analysis is necessary for ERISA qualified retirement benefits.

Second, if this Court decides that "applicable nonbankruptcy law" does not include ERISA § 206(d)(1), then this Court should determine whether the retirement benefits that are included in a debtor's bankruptcy estate are *exempt* from creditors pursuant to Bankruptcy Code § 522. The two specific issues to analyze in this step are, first, whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b), and second, whether Bankruptcy Code § 522(b) and ERISA § 514(d) save state exemption statutes from preemption by ERISA. The Court should conclude under either analysis that retirement benefits are protected.

A. A Debtor's Retirement Benefits are *Excludable* From the Bankruptcy Estate Pursuant to Bankruptcy Code § 541(c)(2) Because "Applicable Nonbankruptcy Law" Encompasses ERISA § 206(d)(1).

In the wake of this Court's decision in *Ron Pair,* a plethora of Courts have critically examined the precedent of *Goff* and its progeny on the question of whether "applicable nonbankruptcy law" found in Bankruptcy Code § 541(c)(2) is a narrow reference to state spendthrift trust law or is broad enough to encompass ERISA's anti-alienation provisions. Included amongst these courts are the Third Circuit in *Velis,* the Fourth Circuit in *Moore,* the Sixth Circuit in *Lucas,* and the Tenth Circuit in *Harline.* These courts, as well as several lower courts, have held that "applicable nonbankruptcy law" is not limited to state spendthrift trust law but also includes ERISA's anti-alienation provision found in ERISA § 206(d)(1).

Unlike *Goff* and its progeny, these courts had the benefit of many well-reasoned recent cases by this Court which have held that the plain meaning of a statute controls. *See Toibb v. Radloff,* 111 S. Ct. 2197, 2200 (1991) (hereinafter "*Toibb*"); *Ron Pair,* 489 U.S. at 242; *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 808 n. 3 (1989) (hereinafter "*Davis*"); *Burlington Northern R. R. v. Oklahoma Tax Comm'n,* 481 U.S. 454, 461 (1987) (hereinafter "*Burlington*").

The Third, Fourth, Sixth and Tenth Circuits hold that an appeal to the legislative history of Bankruptcy Code § 541(c)(2) is inappropriate because the language of the

statute is clear. Legislative history is irrelevant to the interpretation of an unambiguous statute.

The Fourth Circuit in *Moore* pointed out that the term "applicable nonbankruptcy law" is used throughout the Bankruptcy Code and, in places other than Bankruptcy Code § 541(c), the term includes federal law as well as state law. The Fourth Circuit in *Moore* stated:

> It is incongruous to give the same phrase in § 541(c)(2) a narrower construction than the identical phrase in other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute.

907 F.2d at 1477.

If Congress really wanted Bankruptcy Code § 541(c)(2) to apply only to state spendthrift trust law, the term "state spendthrift trust law" could easily have been used in the statute rather than the term "applicable nonbankruptcy law." The term "applicable nonbankruptcy law" suggests no limitation to state spendthrift trust law and this Court, just like the Third, Fourth, Sixth and Tenth Circuits, should refuse to read such a limitation into the statute.

These four Circuits also hold that, even if the legislative history of Bankruptcy Code § 541(c)(2) were relevant, it would be inconclusive. At most, the legislative history suggests that Congress wanted to include state spendthrift trust law within the meaning of "applicable nonbankruptcy law." This Court stated in *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) ("*GTE Sylvania*"), that "[a]bsent a clearly expressed

legislative intention to the contrary, th[e] language must ordinarily be regarded as conclusive." *See also Toibb,* 111 S. Ct. at 2200 (quoting *GTE Sylvania*).

In light of this Court's plain meaning rule for statutory construction, and the decisions of the Third, Fourth, Sixth and Tenth Circuits, this Court should interpret Bankruptcy Code § 541(c)(2) according to its unambiguous terms and hold that a debtor's retirement benefits are excluded from the debtor's bankruptcy estate and, therefore, the retirement benefits remain protected from creditors.

B. A Debtor's Retirement Benefits are *Exempt* from Creditors Pursuant to Bankruptcy Code § 522(b)(2).

There are two specific issues to analyze under this step. These issues are (1) whether ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified retirement benefits, and (2) whether state exemption statutes protecting retirement benefits are preempted by ERISA § 514(a) or does Bankruptcy Code § 522(b) elevate state exemption statutes to the status of federal law thereby saving these state statutes from preemption through ERISA § 514(d).

1. ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2).

Goff and its progeny determined that ERISA § 206(d)(1) was not "other federal law" under Bankruptcy

Code § 522(b)(2) because ERISA was not included on an illustrative list of "other federal law" included in the legislative history to Bankruptcy Code § 522(b)(2). These courts failed to look at the plain meaning of the statute and instead went to the legislative history.

The task of resolving the dispute over the meaning of Bankruptcy Code § 522(b)(2)(A) must begin where this Court has stated all such inquiries must begin – with the language of the statute itself. *Ron Pair,* 489 U.S. at 241. This statute states that "any property that is exempt under federal law, other than subsection (d) of this section" is exempt from creditors of the bankruptcy estate. The statute clearly provides an exemption to any property exempt under federal law with one exception – Bankruptcy Code § 522(d). Congress provided for no other exceptions or limitations. Therefore, if any federal law other than Bankruptcy Code § 522(d) provides an exemption to property, that property remains exempt from creditors of the bankruptcy estate. The statute is clear and unambiguous on its face so "the inquiry should end, for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Id.* Reference to legislative history is not necessary. *See In re Starkey,* 116 B.R. 259 (Bankr. D. Colo. 1990) (hereinafter "*Starkey*"); *In re Burns,* 108 B.R. 308 (Bankr. W.D. Okla. 1989) (hereinafter "*Burns*"); *In re Komet,* 104 B.R. 799 (Bankr. W.D. Tex. 1989) (hereinafter "*Komet*"). For additional authority regarding the plain meaning rule and the use of legislative authority, refer to the analysis in the prior section citing *Toibb, Davis, Burlington, Velis, Moore, Lucas* and *Harline.*

Even if this Court were to look at the legislative history to Bankruptcy Code § 522(b)(2) in deciding this issue, the failure to include an item in an illustrative list is not probative. If resort is to be made to the legislative history, then the interpretation of that history must be disciplined. As stated by the *Komet* court:

> It is a non-sequitur to say that the *failure* to *include* something on an *illustrative* list is probative of an intent to exclude it from that list. Illustrative lists (in contrast to exhaustive lists) by their nature preclude the possibility of "overlooking" a statute of the type already listed.

104 B.R. at 815 (emphasis in original).

Goff and its progeny have gone to extraordinary lengths to explain why ERISA is not included in the illustrative list. A favorite argument of *Goff* and its progeny is that because Congress listed significantly less comprehensive and less well known statutes but excluded the better known ERISA statute, Congress must have intended to exclude the ERISA statute. The argument misses the point that an illustrative list is simply that – illustrative and not exhaustive. Their arguments do not consider the origination of the illustrative list which came from the old Bankruptcy Act and was created prior to the enactment of ERISA. Two of the statutes included in the legislative history had been repealed prior to it being copied from the Bankruptcy Act's legislative history to the Bankruptcy Code's legislative history and in the case of two other statutes, the citations given were not that of the specified provisions. *Burns*, 108 B.R. at 315.

They also fail to consider this Court's finding in *Guidry* that the anti-alienation and assignment provision

in ERISA is comparable to those in the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act and the Veteran's Benefits Act. *Guidry*, 493 U.S. at 372 n. 13. All of these acts are listed on the illustrative list in the legislative history to Bankruptcy Code § 522(b)(2) and each of these acts covers retirement benefits that are not covered under ERISA and therefore in need of their own anti-alienation provisions.

The reasoning of *Goff* and its progeny is faulty and inconsistent with this Court's reasoning. These cases fail to follow the plain meaning rule for statutory construction and make undisciplined interpretations of the legislative history. Bankruptcy Code § 522(b)(2) is clear on its face and provides that ERISA qualified retirement benefits are exempt from creditors.

2. ERISA § 514(a) does not preempt a state exemption statute protecting retirement benefits because of Bankruptcy Code § 522(b) and ERISA § 514(d).

ERISA § 514(a) provides that ERISA provisions supercede state laws insofar as they relate to any employee benefit plan covered by ERISA. This Court has adopted a broad construction of this preemption clause concluding that ERISA § 514(a) is expansive, not restrictive, and that a state law relates to an employee benefit plan if it has a connection with or reference to such a plan. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990) (hereinafter "*Ingersoll-Rand*"); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (hereinafter

"Mackey"); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) (hereinafter *"Shaw"*).

While ERISA § 514(a) provides for expansive preemption, there are several other provisions in ERISA § 514 that provide exceptions to this general expansive preemption power. These additional provisions are referred to as savings clauses because they expressly save certain statutes from ERISA preemption. The applicable savings clause for this analysis is ERISA § 514(d) which provides that the terms of ERISA shall not "be construed to alter, amend, modify, invalidate, impair or supercede" any federal laws.

The Bankruptcy Code is an example of federal law that is not preempted by ERISA because of ERISA § 514(d). Congress, in drafting the Bankruptcy Code, relied upon the states to assist it in accomplishing its goals. In particular, Congress relied on the states to set appropriate exemption levels, considering the circumstances in their states, to ensure that a debtor comes out of bankruptcy with sufficient possessions for a fresh start.

Bankruptcy Code § 522(b) provides two alternative types of exemption schemes for debtors in bankruptcy. One alternative is the generic federal exemptions found in Bankruptcy Code § 522(d), used by debtors in states that fail to create their own exemptions and never opt out of this alternative. The second alternative type of exemptions are any exemptions provided under federal law, other than in Bankruptcy Code § 522(d), and any exemptions provided by state law. A large number of states have elected to opt out of the generic federal exemptions alternative and create their own exemptions. Once a state

elects to opt out of the generic federal exemptions, debtors in that state no longer have the generic federal exemptions available to them.

The authority of states to opt out of the generic federal exemptions and create state exemptions is not derived from the state exemption statutes themselves, but from Bankruptcy Code § 522(b). Without Bankruptcy Code § 522(b), these state exemption statutes would be meaningless to debtors in bankruptcy and would be preempted by the Bankruptcy Code itself.

The issue then is whether state exemption statues authorized by Bankruptcy Code § 522(b) and created to assist in the enforcement of federal bankruptcy goals are protected from preemption by Bankruptcy Code § 522(b).

This Court conducted a similar analysis in *Shaw* and concluded that under certain circumstances ERISA § 514(a) does not preempt state laws authorized by federal statute.

The *Shaw* matter involved three statutes, Title VII of the Civil Rights Act of 1968, 42 U.S.C. § 2000(e) *et seq.* ("Title VII"), the New York Human Rights Law which prohibits discrimination in employment disability benefits between pregnant and non-pregnant disabled employees ("New York Statute") and ERISA. Title VII, in part, prohibits discrimination based on pregnancy and allows states to pass statutes that are more restrictive than the requirements of Title VII. The New York Statute was more restrictive than Title VII and involved disability plans covered by ERISA. Several employers sought a declaratory judgment of preemption of the New York Statute by ERISA. New York State argued that the New

York Statute was protected from preemption by ERISA because Title VII allowed these types of state laws and ERISA § 514(d) states that ERISA shall not be construed to "alter, amend, modify, invalidate, impair or supercede any law of the United States . . . or any rule or regulation issued under any such laws."

This Court first stated in *Shaw* that ERISA did not preempt entirely the New York Statute given its importance to the federal enforcement scheme of Title VII. Such a preemption would impair Title VII. *Shaw*, 463 U.S. at 102. This Court said:

> If ERISA were interpreted to preempt the Human Rights Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the enforcement scheme contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.

Id. Clearly, this Court recognizes that when Congress desires joint state and federal participation in a federal statute, the state participation is elevated to the level of the federal statute and protected from preemption as long as the invalidation of the state statute would "alter, amend, modify, invalidate, impair, or supercede" the authorizing federal statute.

This Court went on to say in *Shaw*:

> Insofar as state laws prohibit employment practices that are lawful under Title VII, however, pre-emption would not impair Title VII within the meaning of § 514(d). Although Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII, . . . it in no way depends on such extensions for its enforcement. Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no state made additional employment practices unlawful. Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit. We fail to see how federal law would be impaired by preemption of a state law prohibiting conduct that federal law permitted.

Id. at 103-104. This Court provided that when a federal statute allows states to create law that is more restrictive than the federal statute, the federal statute is not impaired by the invalidation of such a state law. Thus in *Shaw*, the New York statute was preempted in part and saved in part under ERISA. The enforcement part of the New York Statute was saved because it was an integral part of Title VII and its invalidation would impair Title VII. The more restrictive prohibitions against discrimination contained in the New York Statute were preempted by ERISA because the invalidation of these restrictions did not impair the discrimination prohibitions in Title VII.

Just as the enforcement provisions of the New York Statute are an integral part of Title VII, so are state

exemption statutes an integral part of the Bankruptcy Code. Unlike the discrimination provisions of the New York Statute, if a state exemption statute is invalidated, the effect is to impair Bankruptcy Code § 522. The discrimination provisions of the New York Statute are *in addition to* the provisions of Title VII. A state exemption statute is an *alternative to* Bankruptcy Code § 522(d).

These state exemption statutes help implement important federal bankruptcy goals such as a debtor's fresh start. If ERISA is allowed to preempt state exemption statutes protecting retirement benefits, those states who have opted out of the generic federal exemptions to participate with Congress in achieving its bankruptcy goals will be unable to provide any protection to their citizens' retirement benefits. This result is contrary to Congress' desire to protect retirement benefits and impairs Bankruptcy Code § 522(b). Congress determined that the Bankruptcy Code is paramount to ERISA and the same is true for state laws enacted pursuant to specific authority of the Bankruptcy Code. *In re Vickers*, 116 B.R. 149 (Bankr. W.D. Mo. 1990), *aff'd*, 126 B.R. 348 (Bankr. W.D. Mo. 1990), *aff'd*, ___ F.2d ___, 60 U.S.L.W. 2487 (8th Cir. Jan. 24, 1992). *See also In re Dyke*, 943 F.2d 1435 (5th Cir. 1991) (ERISA § 522(b) does not preempt a state exemption statute because of Bankruptcy Code § 522(b) and ERISA § 514(d)).

CONCLUSION

In light of this Court's decision in *Ron Pair, Guidry, Toibb, Davis, Shaw* and *Burlington*, the Third Circuit decision of *Velis*, the Fourth Circuit decision of *Moore*, the Fifth Circuit decisions of *Volpe* and *Dyke*, the Sixth Circuit decision of *Lucas*, the Eighth Circuit decision of *Vickers*, the Tenth Circuit decision of *Harline*, the plain meaning of Bankruptcy Code §§ 522(b)(2) and 541(c)(2) and the clear Congressional policy considerations involved, this Court should determine (1) that ERISA qualified retirement benefits of a debtor in bankruptcy are excluded from the debtor's bankruptcy estate pursuant to Bankruptcy Code § 541(c)(2), (2) that ERISA § 206(d)(1) is "other federal law" within the meaning of Bankruptcy Code § 522(b)(2) thereby exempting ERISA qualified retirement benefits, and (3) that state exemption statutes protecting retirement benefits are saved from ERISA preemption by Bankruptcy Code § 522(b). Such a ruling will ensure the continued protection of retirement benefits of a debtor sought by Congress even if that debtor were forced to file bankruptcy.

Respectfully submitted,

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(16)

No. 91-913

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN R. PATTERSON,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF LINCOLN NATIONAL CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the anti-alienation provisions of the Employee Retirement Security Act of 1974 (ERISA) constitute "applicable nonbankruptcy law" within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.) so that a bankruptcy trustee may not acquire a debtor's assets in an ERISA plan that could not be reached by creditors outside of bankruptcy.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE SUPPORTING RESPONDENT

Lincoln National Corporation moves this Court for an order granting Lincoln National leave to file its Brief as Amicus Curiae Supporting Respondent. Respondent (the debtor) has consented to Lincoln National's filing, but petitioner (the trustee in bankruptcy) has not. In support of this motion, Lincoln National states:

1. This case presents an issue of great importance to Lincoln National -- *i.e.*, whether the anti-alienation provisions of the Employee Retirement Security Act of 1974 (ERISA) constitute "applicable nonbankruptcy law" within the meaning of Section 541(c)(2) of the Bankruptcy Code (11 U.S.C.) so that a bankruptcy trustee may not acquire a debtor's assets in an ERISA plan that could not be reached by creditors outside of bankruptcy.

2. Lincoln National Corporation sponsors an ERISA savings and retirement program for its employees -- the Lincoln National Corporation Employee Profit & Savings Plan. The Lincoln National Plan has more than 8,400 participants. The Lincoln National Plan is qualified under Section 401 of the Internal Revenue Code and contains the anti-alienation provisions mandated by ERISA, the Internal Revenue Code, and IRS regulations.

3. From time to time, bankruptcy trustees have attempted to reach assets held by the Lincoln National Plan. Currently, the Lincoln National Plan is a defendant-appellant in three adversary proceedings in the United States District Court for the Northern District of Indiana. In those cases, the bankruptcy court ordered the Lincoln National Plan to disregard the terms of its Plan and to turn over ERISA trust funds to the bankruptcy trustee. The Lincoln National Plan has appealed those orders to the district court. The Court's decision in this case very likely will determine the outcome of those pending cases.

4. Lincoln National's main interest is to ensure that this Court follows the plain terms of the Bankruptcy Code so that the access restrictions in its profit and savings plan are governed exclusively by federal law -- *i.e.*, ERISA and the Internal Revenue Code. If petitioner's argument were accepted by this Court -- so that the Bankruptcy Code would only respect state spendthrift-trust laws -- then Lincoln National would be obliged to draft its Plan in accordance with the varied laws of many different states. And Lincoln National could never be sure that its Plan's access restrictions would be upheld by the various states' laws. That is important because the Internal Revenue Service has threatened a loss of tax-qualification status to ERISA plans that turn over funds to bankruptcy trustees. Lincoln National, of course, has a strong interest in avoiding such a result so as to protect the interests of its thousands of Plan participants.

5. We believe that Lincoln National's amicus curiae brief will assist the Court in at least two ways. First, the Court's decision in this case will likely affect all ERISA pension and profit and savings plans. The particular plan at issue in this case, however, does not resemble many ERISA pension plans. In this case, respondent largely controlled the plan and was its principal participant. Accordingly, Lincoln National can aid the Court by presenting the perspective of a different kind of ERISA-qualified plan -- *i.e.*, a large pension plan not controlled by any participant and with thousands of employee participants across the nation. In short, Lincoln National can speak from the perspective of an ERISA plan, not from the parochial viewpoint of a debtor or a bankruptcy trustee. Second, many courts have thought that the practice under the old Bankruptcy Act is relevant to a proper interpretation of the new Bankruptcy Code. Petitioner also makes that argument in his brief. Our amicus brief will be helpful on that point because Lincoln National has researched the old practice and has discovered material that no court has yet addressed.

Wherefore, Lincoln National asks this Court to grant it leave to file its amicus curiae brief supporting respondent.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-913

JOHN R. PATTERSON,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF LINCOLN NATIONAL CORPORATION AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

Lincoln National Corporation sponsors an ERISA savings and retirement program for its employees -- the Lincoln National Corporation Employee Profit & Savings Plan. The Lincoln National Plan has more than 8,400 participants. The Lincoln National Plan is qualified under Section 401 of the Internal Revenue Code and contains the anti-alienation provisions mandated by ERISA, the Internal Revenue Code,

and IRS regulations. From time to time, bankruptcy trustees have attempted to reach assets held by the Lincoln National Plan. Currently, the Lincoln National Plan is a defendant-appellant in three adversary proceedings in the United States District Court for the Northern District of Indiana. In those cases, the bankruptcy court ordered the Lincoln National Plan to disregard the terms of its Plan and to turn over ERISA trust funds to the bankruptcy trustee. Lincoln has appealed those orders to the district court.

Lincoln National's primary interest in this case is to ensure that this Court follows the plain terms of the Bankruptcy Code so that the access restrictions in its pension plan are governed exclusively by federal law -- *i.e.*, ERISA and the Internal Revenue Code. That result will allow the Lincoln National Plan to look to one uniform body of law as the Plan drafts rules governing a participant's access to trust funds.

STATEMENT AND SUMMARY OF ARGUMENT

1. Petitioner, a bankruptcy trustee, seeks to recover as part of the bankruptcy estate the debtor's vested interest in a qualified ERISA pension plan. That plan, as required by ERISA and the Internal Revenue Code, has "non-alienation provision[s]" that "'prevent both voluntary and involuntary encroachments on vested benefits.'" 943 F.2d 362, 364 (4th Cir. 1991) (citation omitted). Petitioner claims that those anti-alienation provisions are not valid in bankruptcy. The merit of petitioner's claim depends on the proper interpretation of Section 541(c)(2) of the Bankruptcy Code. Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under" the Bankruptcy Code.

The district court agreed with petitioner that the phrase "applicable nonbankruptcy law" in Section 541(c)(2) includes only state laws governing so-called spendthrift trusts. 943 F.2d at 363. The district court then held that the plan in this case did not qualify as a spendthrift trust under Virginia law; therefore, the court ruled that the plan's anti-alienation provisions were invalid in bankruptcy. Accordingly, the district court held that the debtor's funds in the ERISA plan were part of the bankruptcy estate. *Ibid.*

2. The court of appeals reversed. The court wrote that "the plain language" of Section 541(c)(2) is "not limited to state law but" also "embrace[s] federal statutes, including ERISA." 943 F.2d at 363-64. The Fourth Circuit, therefore, ruled that the anti-alienation provisions of ERISA qualify as "applicable nonbankruptcy law." Hence, the court of appeals held that the debtor's interest in a qualified ERISA pension plan was not part of the bankruptcy estate.

3. The Fourth Circuit's decision is correct. The last four circuits to consider the issue have agreed that the plain meaning of the phrase "applicable nonbankruptcy law" is broad enough to encompass federal statutes such as ERISA. *See also Gladwell v. Harline*, 950 F.2d 669 (10th Cir. 1991); *Velis v. Kardanis*, 949 F.2d 78 (3d Cir. 1991); *In re Lucas*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S. Ct. 2275 (1991) In any event, the legislative history of Section 541(c)(2) plainly supports that natural reading of the statute. Furthermore, the court of appeals' decision has the virtues of: (1) reconciling the Bankruptcy Code with ERISA, and (2) making the drafting of ERISA pension plans exclusively a matter of federal law. For all those reasons, the Fourth Circuit's decision should be affirmed.

ARGUMENT

1. We agree with the Fourth Circuit that this is a "plain meaning" case. The meaning of "applicable nonbankruptcy law" in Section 541(c)(2) is evident. If, outside of bankruptcy proceedings, a debtor and his creditors could not reach the debtor's funds held in trust (*i.e.*, under "nonbankruptcy law"), then the bankruptcy estate does not include the debtor's interest in such trust funds. In adopting the Bankruptcy Code, Congress did not attempt to micro-manage the area of trust law by setting forth the types of trust laws that qualify as "nonbankruptcy law." Rather, Congress used the sweeping phrase "nonbankruptcy law," which is broad enough to include both federal statutes and state laws that enforce access restrictions in trust instruments.

This case likely would never have reached this Court but for the Fifth Circuit's decision in *In re Goff*, 706 F.2d 574 (5th Cir. 1983), on which petitioner relies. In that case, the court held that the phrase "applicable nonbankruptcy law" in Section 541(c)(2) did not include federal law -- in particular ERISA. The *In re Goff* court did not ask whether Section 541(c)(2) has a facially plain meaning. *See* 706 F.2d at 581. Instead, after noting that Section 541(c)(2) is "facially broad" (*ibid.*), the *In re Goff* court went directly to the statute's legislative history. And the court ruled that the statute's legislative history showed that "Congress intended by its reference to 'applicable nonbankruptcy law' to exempt from the estate only those 'spendthrift trusts' traditionally beyond the reach of creditors under state law." 706 F.2d at 582.

In light of more recent decisions of this Court, it is clear that the *In re Goff* court's method of statutory interpretation was incorrect. As the Court stated in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), "[l]egislative history is

irrelevant to the interpretation of an unambiguous statute." *Id.* at 808 n.3. In other words, "[j]udicial inquiry is complete" when the court finds "the terms of a statute unambiguous." *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citation omitted). And, in this case, the phrase "applicable nonbankruptcy law" in Section 541 unambiguously includes both federal and state laws.

2. In any event, the legislative history of Section 541(c)(2) supports the Fourth Circuit's decision. The House of Representatives committee report pertaining to Section 541(c)(2) states:

> The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law. The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust.

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 176 (1977). This passage undoubtedly shows that Congress intended that state laws governing spendthrift trusts would fall within the category of "applicable nonbankruptcy law." But there is no indication in the report that Congress thought that the phrase "applicable nonbankruptcy" law included *only* such state laws. The committee report simply does not attempt to list all the types of "nonbankruptcy laws" that govern restrictions on transfers of trust funds.

Indeed, the principle announced in the House committee report is wholly consistent with the natural meaning of the statutory language -- *i.e.*, the Bankruptcy Code respects both federal and state laws upholding restrictions on the transfer of trust funds. The report's basic principle, on which the *In re Goff*

court relied (706 F.2d at 582), is that Congress wanted to "continue[] over" the prior bankruptcy law regarding assets held in trusts. H.R. Rep. No. 95-595, at 176. Petitioner incorrectly assumes (Br. 39-42), however, that the old Bankruptcy Act only incorporated state spendthrift-trust laws.

To be sure, before the passage of ERISA, state law most commonly governed the question whether trust assets could be alienated. *See, e.g., In re Ahlswede*, 516 F.2d 784, 786 (9th Cir.), *cert. denied*, 423 U.S. 913 (1975). Under the old Bankruptcy Act, however, the courts also looked to *federal* statutes regarding alienability in cases "where the trust is one created and controlled by federal law." 4A *Collier on Bankruptcy* § 70.26, at 365-66 (14th ed. 1978). For example, the courts ruled that federal law prohibited alienation of certain assets held in trust for Indians and, therefore, those assets did not become a part of the bankruptcy estate. *See Taylor v. Tayrien*, 51 F.2d 884 (10th Cir. 1931); *In re Denison*, 38 F.2d 662 (W.D. Okl. 1930). Accordingly, if the House report confirms that Congress wanted Section 541(c)(2) to continue prior practice (as petitioner argues), it still follows that the new Bankruptcy Code incorporates *both* state and federal statutes that protect trust assets from the reach of creditors.

3. At bottom, petitioner is advancing an incredible claim of congressional intent. In 1974, Congress made important aspects of trust law a matter of federal law when it passed ERISA, including its anti-alienation provisions. ERISA governs pension plans, which are trusts administered for the benefit of employees. In adopting ERISA, Congress preempted state law and made federal law the exclusive body of law governing such trusts. *See* 29 U.S.C. 1144(a). Four years later, Congress passed Section 541(c)(2) of the Bankruptcy Code. When Congress passed the Bankruptcy Code in 1978, it is

incredible to believe that Congress implictly undermined the ERISA statute that it had so recently enacted.

Moreover, petitioner's view of congressional intent (if accepted) would effectively require sponsors of ERISA pension plans to draft plans to meet the vagaries of each state's spendthrift- trust laws. But Congress adopted ERISA precisely to avoid such state-by-state regulation of pension plans. As this Court stated in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), the goal of ERISA was "to ensure that plans and plan sponsors would be subject to a uniform body of [federal] law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Id.* at 484. It makes no sense, therefore, to believe that Congress used the broad phrase "nonbankruptcy law" in Section 541(c)(2) to include state laws pertaining to trusts but to exclude Congress's own highly significant statute -- ERISA.

4. It is important for the Court to keep in mind that this type of case cannot be resolved simply by noting that it involves an ERISA plan. The key question is whether the debtor's funds held in trust were restricted from alienation under the terms of the trust instrument on the date the debtor filed his bankruptcy petition.[1] If the funds were so restricted, then Section 541(c)(2) asks whether those restrictions are valid under state or federal laws, including ERISA. By contrast, if the debtor has a present right to withdrawal the funds, or the present right to receive

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[1]Under the Bankruptcy Code, "the critical time as of which the property comprising the estate is to be determined . . . is the date upon which the petition is filed." 4 L. King, Collier on Bankruptcy § 541.04, at 541-22 (15th ed. 1991).

income, then Section 541(c)(2) and ERISA would not create a restriction on alienation that does not otherwise exist.

This explains why petitioner is mistaken in asserting (Br. 25-29) that Section 541(c)(2) cannot encompass ERISA because that would render meaningless the exemption in Section 522(d)(10)(E). Section 522 applies in a case where an ERISA pension-plan participant has a present right to funds held in the plan (*e.g.*, the participant is in "pay status"). Such funds would not be excluded by the terms of the ERISA plan or by Section 541(c)(2); therefore, Section 522(d)(10)(E) is needed to provide a limited exemption for reasonable support of the debtor and his family. *See Gladwell v. Harline*, 950 F.2d at 675; *Velis v. Kardanis*, 949 F.2d at 82.

5. Petitioner argues (Br. 55-58) that the Fourth Circuit's reading of the pertinent statutes is so unfair that this Court should create an "equitable exception" to those laws. But Section 541(c)(2) of the Bankruptcy Code was expressly designed to keep certain assets of the debtor held in trust from the reach of creditors. Similarly, as this Court noted in *Guidry v. Sheet Metal Workers National Pension Fund*, 110 S. Ct. 680 (1990), the anti-alienation provisions in ERISA were enacted to protect pension plan assets from creditors. The Court in *Guidry* stated that the anti-alienation provisions of ERISA represent a "considered congressional policy choice" that necessarily "hinder[s] the collection of a lawful debt." 110 S. Ct. at 687. Congress made that policy decision as part of its effort "to safeguard an income stream for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Ibid.* Congress was willing to accept that consequence in order to protect a pensioner's retirement income, and that policy choice applies equally in all situations

-- including bankruptcy. Accordingly, the courts are not now free to create exceptions to the anti-alienation provisions; "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry*, 110 S. Ct. at 687.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 1992

Petitioner,

Jr.,

Respondent.

IN THE

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---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL URGING AFFIRMATION

Pursuant to Rule 37.4 of the Rules of the Court, The American College of Trust and Estate Counsel (the "College") moves to appear as *Amicus Curiae* and for leave to file the attached *amicus curiae* brief urging that the opinion of the Court of Appeals for the Fourth Circuit be AFFIRMED. Pursuant to Rule 37.3, the Respondent has given the College a written consent to file this *amicus curiae* brief, but the Petitioner has not, thereby requiring that this motion be filed.

The American College of Trust and Estate Counsel is a professional association of lawyers with a current membership of over 2,600 Fellows from throughout the United

States who have been elected to membership by their peers on the basis of their professional reputation, their demonstrated exceptional skill and ability in probate, trust, estate planning and employee benefits law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. It is the policy of the College, as set forth in its Handbook, to file *amicus curiae* briefs only with the authorization of the Board of Regents and then only "sparingly" and on matters "of special significance to the legal profession or the public." In its forty-five year history, the College has filed only four prior *amicus curiae* briefs, choosing to undertake that task on issues of national importance "where such a brief would contribute significantly in the determination of the issues involved."

With the growing economic displacement now occurring, not only among rank and file employees but in the executive and professional ranks as well, and with the increasing number of bankruptcy filings, it cannot be doubted that the issue before the Court in this case touches the lives of many Americans. There have been in excess of 100 contested cases in each of the last three years involving the questions raised by this appeal. The resolution of the issues is snarled in complex statutory provisions requiring that two federal statutes, state law, and the public policy reflected in those statutes be reconciled. The courts are, to understate the case, in disarray in effecting such reconciliation.

Because this issue was first litigated in the bankruptcy courts by bankruptcy lawyers, the early cases announced the law without the benefit of the experience and viewpoint of the trust bar and the employee benefit bar. Some of those decisions clearly indicate a failure by the courts to understand the intricacies and operation of ERISA and the basic principles of trust law which operate on the employee benefit trusts created pursuant to that statute as well as under state law. If the Bankruptcy Code and

ERISA are to be harmonized, then a comprehensive understanding of the key provisions of both statutes is required.

The College's brief supports the contentions of Respondent that the interest of a debtor in a qualified plan is <u>excluded</u> from the bankruptcy estate since ERISA constitutes "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), and that alternatively ERISA's anti-alienation provision is an exemption provided by federal law under 11 U.S.C. § 522(b)(2)(A). As to Petitioner's third point in his Petition for *Writ of Certiorari*, it is the College's position that the public policy of protecting retirement benefits propounded by Congress through ERISA is clear and draws no distinctions between persons "in control" and those not so situated.

The College's position differs to an extent from that of Respondent. In answer to the public policy issue raised by Petitioner, Respondent would seek to distinguish the Coleman Furniture Company Pension Plan (the "CFC Plan") from those of smaller businesses on the basis that the CFC Plan had approximately 400 participants and that CFC was a large corporation. That factor should not affect the analysis or the application of the law. Mr. Shumate was as much in control of CFC and the CFC Plan as he would have been had CFC had only two employees. The College would urge that Congress did not draw any such distinctions based upon size, and that the public policy protects the owner of a small closely-held business as well as the owner of a large closely-held business.

Further, Petitioner relies heavily on an analysis of 11 U.S.C. § 522(d)(10)(E), and particularly subsection (iii) thereof, to demonstrate that the reading of 11 U.S.C. § 541(c)(2) urged by Respondent and the College would somehow render 11 U.S.C. § 522(d)(10)(E) meaningless, and thereby violate the basic rule of statutory construction that Congress did not enact superfluous provisions. Because ERISA is the crux of the subsection (iii) argument, the College can provide to this Court an analysis grounded in familiarity and expertise.

If the Court should decide that the debtor's interest in a pension plan is neither excluded nor exempt (or that public policy requires a differentiation based upon the interest of the debtor in the plan sponsor), such decision will destroy ERISA's carefully crafted federal scheme, and will throw the issue back to the states so that plan administrators will be forced to deal with the laws of fifty-one separate jurisdictions. The College will illustrate in its brief the results of that approach to this issue, and why that conflicts with the sound public policies already enunciated by ERISA as acted upon by the Bankruptcy Code.

The College believes that while some of these issues will be addressed by Respondent (and have already been addressed by Petitioner and Petitioner's *amicus curiae*), the College brings a different viewpoint as well as a different depth of expertise to these issues. The College has no client to represent, and is interested solely in the public interest and in assisting this Court to resolve these issues so that the burden on the federal court system can be eased.

WHEREFORE, having shown that the College brings a different perspective to the proceedings, and that the expertise of the College in ERISA and trust law will allow it to bring to the attention of the Court relevant matters not raised by the parties, the College prays that its motion for leave to file its *amicus curiae* brief be GRANTED.

Respectfully submitted,

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Dated: April 3, 1992.

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BRIEF OF AMICUS CURIAE THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL URGING AFFIRMATION

INTEREST OF THE AMICUS CURIAE

The American College of Trust and Estate Counsel (the "College") respectfully submits this brief in support of the position of Respondent, and has obtained the permission of Respondent to do so. The College has been unable to obtain the permission of the Petitioner and therefore has simultaneously herewith filed its Motion for Leave to File Amicus Curiae Brief pursuant to Rule 37.4.

The College is a professional association of lawyers with a current membership of over 2,600 Fellows from throughout the United States who have been elected to membership by their peers on the basis of their professional reputation and their demonstrated exceptional skill and

ability in probate, trust, estate planning and employee benefits law, and who have made substantial contributions to these fields through lecturing, writing, teaching and bar activities. The College has no "client" in this matter. Rather, as a professional organization dedicated to the service and advancement of the law, the College feels a duty to employ its expertise in such a way as to provide whatever assistance it may to the Court in resolving the complex issues which have vexed the lower courts at all levels, and have produced an extreme amount of litigation.

The College does not undertake the filing of *amicus curiae* briefs lightly. It has a stringent policy requiring that such briefs be filed on behalf of the College only on issues of special significance to the legal profession and to the public, and then only with the consent of the Board of Regents of the College. Even then, such brief may only be filed in support of a position of the College. Because of its recognized preeminence in the estate planning, probate, trust and employee benefits bars, the College does not adopt a position that it feels is not in the public interest.

The College's brief, while supporting the result urged by Respondent, nevertheless seeks to take a broader view of the problems and to deal with arguments not sufficiently raised or dealt with by the parties. Additionally, the College will bring to the attention of the Court certain consequences, not readily apparent, which would naturally flow from a decision for Petitioner.

SUMMARY OF ARGUMENTS

This case is before this Court with the request that it answer three issues: whether a debtor's interest in a pension plan is "property" included in the estate of a bankrupt participant; if included, whether it is nonetheless exempt; and if either excluded or exempt, whether there is some overriding public policy which would cause those rules not to apply to a person in a position to exercise dominion and control. Despite the best efforts of the Petitioner to

make it otherwise, the case, purely and simply, is one of statutory construction.

There is no dispute that pension plans are protected from claims of creditors prior to the filing of a petition in bankruptcy. Congress, in enacting ERISA, made clear both its purpose and the means Congress chose to accomplish that purpose—to create a uniform federal scheme which would protect the interest of employees in their pension benefits through ERISA's anti-alienation provision. It is ludicrous to suppose that Congress meant to remove that protection in bankruptcy, just when it was needed most, thereby frustrating the principal purpose of ERISA announced by Congress.

Question 1: *Is the participant's interest excluded from the estate?*

The Bankruptcy Code[1] requires first that all property of the bankrupt as defined by Code § 541 be included in the bankruptcy estate, except certain trusts not treated as property under Code § 541(c)(2). Although Code § 522 provides that the debtor may choose to exempt assets from the bankruptcy estate under an exclusively federal exemption scheme or under the state law exemptions (which include federal law other than the Code), there is no federal/state dichotomy with respect to the definition of property and what interests are not property; *i.e.*, what interests are "excluded" from the estate. The exclusion under Code § 541(c)(2) applies to any applicable nonbankruptcy law, including ERISA, and is nowhere limited to, although clearly including, state spendthrift trust law. In fact, to so limit the exclusion is to render it a nullity in an opt-out state such as Virginia or with respect to any bankrupt that elects the state law exemptions in a non opt-out state. Applicable nonbankruptcy law is an unambiguous term referring to both state and federal law. Even if the term is not unambiguous, established rules of sta-

[1] All references to the provisions of the Bankruptcy Code as codified at 11 U.S.C. §§ 101, *et seq.* (1979 & Supp. 1991), will be hereinafter referenced to the section number preceded by "Code."

tutory construction still cause such phrase to encompass both state and federal law.

Construing the exclusion to apply to pension plans does not render the exemption granted under Code § 522(d)(10)(E) meaningless. "Pension plan" is a defined term under ERISA § 3(2)(A)[2], and it is *solely* to these plans that ERISA's anti-alienation provision in ERISA § 206(d)(1) applies. The reach of Code § 522(d)(10)(E) is much broader and includes plans which are not required by ERISA to have an anti-alienation provision and which would not be exempt absent that section. While there may be some overlap, the exclusion does not preempt the field of the exemption. Additionally, the literal language of Code § 522(d)(10)(E) refers to "payments" under the plans to which it applies, whereas the Code § 541 exclusion relates to the plan itself. The exemption is provided for those payments as they are received by the bankrupt.

Question 2: *If not excluded, is the participant's interest exempt?*

The state law exemption scheme includes assets exempt under state law and under federal law other than the Bankruptcy Code. If the Court should find that the debtor's interest in the pension plan is not excluded, then ERISA's anti-alienation provision should be construed to provide an exemption under the "other federal law" exemption of Code § 522(b)(2)(A). Clearly, the anti-alienation provision of ERISA provides an exemption outside of bankruptcy, and there is no reason such exemption should not carry forward into bankruptcy. There is no conflict between the other federal law exemption in Code § 522(b)(2)(A) and the specific federal exemptions in Code § 522(d), since the two are mutually exclusive. The debtor must elect one or the other in those states which have not opted-out of the Code § 522(d) exemptions, and cannot

[2] All references to the provisions of the Employee Retirement Income Security Act of 1974 as codified at 29 U.S.C. §§ 1001, *et seq.* (1985 & Supp. 1991), will be hereinafter referenced to the section number of the Act preceded by "ERISA."

elect the Code § 522(d) exemptions in those states which have opted-out. The Code creates two separate and distinct exemption schemes, and they are not, nor are they intended to be, equal in all respects.

Question 3: *Is there public policy not contained in the statutory language that limits the statute's application?*

ERISA does not distinguish between those persons in control and those persons not in control of pension plans in imposing the anti-alienation requirement of ERISA § 206(d)(1). Nor does the Bankruptcy Code draw any such distinction. In fact, the public policy of ERISA (to protect the retirement benefits of plan participants from the reach of creditors) is made clear in its language and legislative history. The public policy of the Bankruptcy Code is to permit debtors to achieve a "fresh start," whether the debtors were blue collar or white collar, owners or employees. That fresh start is achieved by allowing the debtors to exclude or exempt from the bankruptcy estate those assets protected under state and federal law (other than the Code) or under Code § 522(d). There is no public policy to be served by forcing the bankruptcy courts to draw distinctions among debtors based upon their station in life, particularly since such distinctions are not contained anywhere in the statute nor are they relevant outside of bankruptcy with respect to pension benefit plans.

If the Court should choose to agree with Petitioner that pension plans are neither excluded nor exempt under the Code, then the Court has still left the field open for further litigation to continue unabated. The unresolved issues are:

- Whether the so-called state "shield statutes" are preempted by ERISA so as to be ineffective to create an exemption in bankruptcy.
- Whether a particular pension plan is a spendthrift trust as to the interest of a particular participant as determined solely under state law.

- When, and to what extent is a trustee entitled to a turnover of the actual assets represented by the participant's interest in the pension plan.
- Whether, as the Internal Revenue Service contends, a turnover order disqualifies the entire plan, thus creating adverse tax consequences for the employer and the other participants.

If the judgment of the court below is upheld, as it should be, these questions will be rendered moot, as they should be.

ARGUMENT

I. THE TERM "APPLICABLE NONBANKRUPTCY LAW" FOR PURPOSES OF CODE § 541(c)(2) IS NOT LIMITED TO STATE SPENDTHRIFT TRUST LAW, BUT RATHER INCLUDES RESTRICTIONS ON TRANSFER IMPOSED BY ERISA'S ANTI-ALIENATION PROVISION.

A. When construing two interrelating statutes, they should be construed to give effect to both.

1. The overriding purpose of ERISA is to create a viable private pension system and to effectuate this by protecting the interests of participants in pension benefit plans.

ERISA was enacted to create a comprehensive federal scheme which would encourage the creation of a private pension system to supplement social security and to provide the working men and women of America dignity in their retirement.[3] In order to carry out this purpose, Congress recognized that the participant's interest in a pension plan must be protected from the claims of creditors, and Congress accomplished this protection by enacting a requirement that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." ERISA § 206(d)(1) (the "anti-alienation provision"). Only pension benefit plans are protected under ERISA's anti-alienation provision, even though ERISA's scope is much broader, extending to any employee benefit plan.[4] The anti-alienation provision is required to be included in every pension plan covered by Title I of ERISA,[5] or the plan sponsor and administrator are subject to both civil and criminal penalties.[6]

[3] H.R. Rep. No. 533, 93d Cong., 1st Sess. 6-8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4645-46.

2. The Bankruptcy Code should be construed to effectuate the purposes of ERISA by determining that the Code protects the debtor's interest in pension plans just as such interests are protected by ERISA outside of bankruptcy.

It is undisputed even by Petitioner that pension plans are protected prior to the time the debtor is adjudicated a bankrupt. Petitioner's Brief, p. 19, (*citing Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990)). Based upon the anti-alienation provisions of ERISA and the Internal Revenue Code,[7] courts have not been hesitant to insulate retirement benefits from garnishment or attachment by creditors outside of bankruptcy, even where the participant may withdraw the funds. *See, e.g., Travelers Ins. Cos. v. Fountain City Fed. Credit Union*, 889 F.2d 264, 266 (11th Cir. 1989) (plan could not be garnished even though it was terminated and the benefits were available in a lump sum); *Smith v. Mirman*, 749 F.2d 181, 183-84 (4th Cir. 1984) (same). Moreover, Courts have

[4] A pension benefit plan is one which relates primarily to retirement. ERISA § 3(2). While the term "employee benefit plans" includes pension plans, it also includes employee welfare plans such as health plans, disability plans, and vacation pay plans. ERISA § 3(3).

[5] Even some pension plans, such as government plans and certain church plans, are not subject to Title I of ERISA, including its anti-alienation provision.

[6] *See* ERISA §§ 501-02.

[7] All references to the provisions of the Internal Revenue Code as codified at 26 U.S.C. §§ 1, *et seq.* (1988 & Supp. 1992) will be hereinafter referenced to the section number preceded by "IRC."

indicated that the treatment of property should be the same whether inside or outside of bankruptcy. *See Butner v. United States*, 440 U.S. 48, 55 (1979) (to prevent forum shopping and creditor windfalls, property should be treated the same under bankruptcy law as under debtor-creditor law).

In *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S. 825 (1988), this Court observed that Congress adopted ERISA § 206(d)(1) because otherwise "ERISA plan benefits could be attached and/or garnished." *Mackey*, 486 U.S. at 837. The Court reasoned that

> by adopting [ERISA] §206(d)(1), Congress demonstrated that it could, where it wished to, stay the operation of state law as it effects only benefits and not plans . . . when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans.

Id. at 836.

The holding in *Mackey* and the principle of anti-alienation was reinforced in *Guidry*. In rejecting the judicially implied participant fraud exception to ERISA's anti-alienation provision, the Court reaffirmed that there are no exceptions to ERISA's anti-alienation provision unless Congress specifically expresses one. *Guidry*, 493 U.S. at 370; *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 60 (1990) ("Congress will create exceptions where it sees fit and courts should not do so.")

There is no reason that this federally mandated protection should not carry over into bankruptcy and there offer the shelter from creditors that Congress intended. Code § 541(c)(2) provides a vehicle for achieving this result, although the earlier cases failed to perceive this obvious nexus. *See Samore v. Graham (In re Graham)*, 726 F.2d 1268 (8th Cir. 1984); *Goff v. Taylor (Matter of Goff)*, 706 F.2d 574 (5th Cir. 1983). *See also Matter of LeFeber*, 906 F.2d 330 (7th Cir. 1990); *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Lichstrahl v. Banker's Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985); *In re Kirk*, 101 B.R. 476 (Bankr. N.D. Tex. 1989); *In re Colsden*, 105 B.R. 500 (Bankr. N.D. Iowa, W.D. 1988); *In re Hysick*, 90 B.R. 770 (Bankr. E.D. Pa. 1988);.

Goff is the seminal case among those holding that the "applicable nonbankruptcy law" reference in Code § 541(c)(2) does not include ERISA's anti-alienation provision within its scope. Primarily, *Goff* and its progeny relied on legislative history of the Bankruptcy Code to limit the application of applicable nonbankruptcy law to trusts which qualify as spendthrift trusts under state law.[8]

There is no way to distinguish factually those cases decided in the middle 1980s from the case at bar. Recently, however, the reasoning and approach of *Goff* has come under scrutiny, and in many cases has been discarded. In *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), the Court of Appeals for the Fourth Circuit sought to harmonize ERISA's anti-alienation provision with the Code's exclusion. It did so by holding that the applicable nonbankruptcy law reference in the Code's exclusion was not limited to state law, but included all law, state and federal. Although the court noted that the debtors in *Moore* were not in control, that was not a determining factor, as demonstrated by that court's later holding in the case at bar while relying on *Moore*. *Shumate v. Patterson (In re Shumate)*, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, ___ U.S. ___, 112 S. Ct. 932 (1992).

Three other Courts of Appeals have followed the reasoning in *Moore*. The Sixth Circuit noted that the appli-

[8] "The bill also continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." H.R. Rep. No. 595, 95th Cong., 2d Sess. 176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325.

cation of the Code § 541(c)(2) exclusion to pension plans in a bankruptcy context ". . . harmonizes the Bankruptcy Code, ERISA, and the Internal Revenue Code and gives effect to the express language of those statutes." *Forbes v. Holiday Corp. Savings and Retirement Plan (In re Lucas)*, 924 F.2d 597, 600-01 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2275 (1991). This interpretation also eliminates the different treatment of pension plan interests inside and outside of bankruptcy. As noted by the Tenth Circuit,

> We are also persuaded by the incongruity inherent in the narrower interpretation which would result in ERISA's anti-alienation provisions trumping state law until bankruptcy, but withdrawing that protection upon bankruptcy unless state law would give it.

Gladwell v. Harline (In re Harline), 950 F.2d 669, 675 (10th Cir. 1991). *See also*, *Velis v. Kardanis*, 949 F.2d 78 (3d Cir. 1991).[9]

3. To accept Petitioner's construction of Code § 541(c)(2) is to read it out of the law when the debtor elects the state exemptions under Code § 522(b)(2).

Petitioner would have the exclusion under Code § 541(c)(2) limited in its application to those trusts qualifying as spendthrift trusts under state law. If Petitioner is correct, then there is no need for Code § 541(c)(2) in

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[9] Even the Ninth Circuit, which has elected to follow its prior decision in *Daniel* limiting the Code § 541(c)(2) exclusion to state spendthrift trust law, expressed some concern about the logic of that position:

> We recognize a certain incongruity in the notion that only ERISA's anti-alienation provisions offer protection until bankruptcy, and only state spendthrift provisions do so in bankruptcy. The same might be said of the idea that some ERISA plan benefits are protected from creditors before bankruptcy and lose that protection upon bankruptcy.

In re Kincaid, 917 F.2d 1162, 1166 (9th Cir. 1990).

an opt-out state such as Virginia[10] (or in any case in which the debtor elects the state exemptions), since such a trust would already be exempt under "State . . . law that is applicable." Code § 522(b)(2)(A). Thus, the exclusion section must be read to refer to more than state spendthrift trust law which already operates to provide an exemption.

4. The term "applicable nonbankruptcy law" appearing in Code § 541(c)(2) is clear and unambiguous, and, according to rules of statutory construction, requires the exclusion of ERISA pension plans from the debtor's estate.

This Court has often reiterated the long-standing rule of statutory construction that there is no need to resort to legislative history or any other collateral source in order to interpret a statute that is not ambiguous. *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S. Ct. 403, 407 (1990); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 807 (1989); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Code § 541(c)(2) is just such an unambiguous statute. The use of the term "applicable nonbankruptcy law" is clear in the context of this section because of its consistent use throughout the Bankruptcy Code, and "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

The use of the phrase "applicable nonbankruptcy law" in Code § 541(c)(2) to refer to *either* federal *or* state law is in keeping with the use of that term throughout the Bankruptcy Code. For instance:

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[10] Certain states have elected to require their citizens to utilize only those exemptions available under state law by "opting-out" of the federal exemption scheme. Virginia, the residence of Mr. Shumate, is such a state. Va. Code § 34-3.1 (1990).

- Code § 101(56) uses "applicable nonbankruptcy law" to define intellectual property protected under federal or state law;
- Code § 108 uses "applicable nonbankruptcy law" to extend the time in which the bankruptcy trustee may pursue a cause of action that the debtor might have pursued under federal or state law;
- Code § 365(n)(1)(B) uses the phrase "applicable nonbankruptcy law" to describe the time period for a license agreement under intellectual property laws;
- Code § 1125(d) uses the phrase "applicable nonbankruptcy law" to exempt post-petition disclosure statements from certain disclosure requirements, such as those of federal or state securities laws; and
- Code § 1126(b)(1) uses the phrase "applicable nonbankruptcy law" to declare that any plan solicitations accepted or rejected pre-petition will be valid if disclosure is made in accordance with, for instance, federal or state securities laws.[11]

Moreover, throughout the Bankruptcy Code, Congress has demonstrated that it can limit the application of nonbankruptcy law only to state law when it so desires:

- Code § 109(c)(2) permits an entity to be a debtor under Chapter 9 only if the entity is authorized to be such a debtor "by State law";
- Code § 362(b)(12) limits the length of the automatic stay with respect to foreclosing on ship or fleet mortgages under "applicable State law";

[11] Code § 522(b)(2)(B) allows a debtor to exempt his or her interest in a joint tenancy or tenancy by the entirety to the extent this interest is exempt from seizure under "applicable nonbankruptcy law." While "applicable nonbankruptcy law," in this context, appears to encompass state law only, this does not limit the use of that term throughout the Code. "Applicable nonbankruptcy law" can encompass either federal or state law, and such a use of the term in the context of Code § 541(c)(2) is not inappropriate.

- Code §§ 522(b)(1) & (2) permits the debtor to seek exemptions under the "State law that is applicable";
- Code § 523(a)(5) excludes from the debtor's discharge any debt for either spousal or child support "made in accordance with State or territorial law"; and
- Code § 903(1) declares that a "State law" prescribing a method of composition of indebtedness of a municipality cannot bind a creditor without that creditor's consent.

A cardinal rule of statutory construction is that the statute should be read as a whole and that the meaning of a word or phrase depends on context. *See King v. St. Vincent's Hosp.*, ___ U.S. ___, 112 S. Ct. 570, 574 (1991). A reading of "applicable nonbankruptcy law" to include both federal and state law in Code § 541(c)(2) is therefore proper. Furthermore, this interpretation, which allows the section to include the anti-alienation provisions of ERISA, is also consistent with the policy that a word is presumed to have the same meaning throughout a statute. *Morrison-Knudsen Const. v. Dir., Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983), (*citing Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Congress' deliberate use of a term cannot be ignored, especially in a Code that was drafted and enacted in one piece. The drafters used "applicable nonbankruptcy law" to refer to either federal or state law, while they specifically referred to federal law or state law if they desired to limit the provision to one or the other. Such a use of the term does not make it "inherently ambiguous" and subject to interpretation as Petitioner would assert. Rather, the term is clear, and this Court simply must enforce it, *see Chevron*, 467 U.S. at 842-43, by declaring ERISA to be "applicable nonbankruptcy law" and thus excluding ERISA pension plans from the bankrupt's estate.

5. Even if the term "applicable nonbankruptcy law" is not unambiguous, proper rules of statutory construction will lead to the same result—that Code § 541(c)(2) excludes ERISA pension plans from the debtor's estate.

Even if this Court were to determine that "applicable nonbankruptcy law" is not an unambiguous phrase, the rule of statutory construction that the Court has adopted in other bankruptcy cases would lead to exclusion of ERISA pension plans from the debtor's estate. When a provision of the Code is ambiguous, the Court looks to the Bankruptcy Act in effect prior to the enactment of the Bankruptcy Code for instruction. The Court is reluctant to accept any significant changes in the pre-Code practice that were not clearly enunciated by Congress in some way. *Dewsnup v. Timm*, ___ U.S. ___, 112 S. Ct. 773, 779 (1992); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 501 (1986) ("The Court has followed this rule with particular care when construing the scope of the bankruptcy codifications"); *Kelly v. Robinson*, 479 U.S. 36 (1986).

Section 70(a)(5) of the Bankruptcy Act described those assets that did and did not become a part of the bankruptcy estate:

> (a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . .
>
> (5) property, including rights of action, which prior to the filing of the petition he [the debtor] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . .

11 U.S.C. § 110(a)(5) (repealed 1978).

This section was interpreted to include a two-part test to determine whether an asset should be property of the debtor's estate. First, the court was required to determine whether the asset was "property"; and then the court had to decide whether the asset was "transferable." *See, e.g., Segal v. Rochelle*, 382 U.S. 375 (1966). With respect to the first prong of this test, the courts recognized a difficulty in defining the word "property." *Id.* at 379. Therefore, the courts examined the overall purpose of the Bankruptcy Act to determine what limitations should be put on this definition:

> [o]ne purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future.

Id. This desire to protect the debtor's fresh start caused courts to exclude from the definition of "property," and thus from the bankruptcy estate, wages and assets that were "designed to function as a wage substitute at some future period." *Kokoszka v. Belford*, 417 U.S. 642, 648 (1974) (*quoting Lines v. Frederick*, 400 U.S. 18, 20 (1970) (excluding a debtor's accrued vacation pay from the definition of "property")). Such an exclusion would certainly apply to ERISA plans, and the Fifth Circuit so held in *Matter of Turpin*, 644 F.2d 472 (5th Cir. 1981). *See also Matter of Nunnally*, 506 F.2d 1024 (5th Cir. 1975).

Even if ERISA plans and other trusts with anti-alienation provisions would fulfill the definition of "property" under the Bankruptcy Act, such assets would not be "transferable," and therefore would not be included in the bankruptcy estate. Subsection (5) of § 70(a) excluded non-transferable assets, whether those assets were made non-transferable by federal *or* state law. Courts construed this section to exclude from the estate federally created trusts. *See Tennessee Valley Authority v. Kinzer*, 142 F.2d 833 (6th Cir. 1944) (excluding from bankrupt's estate his interest in a non-transferable, federally created retirement system trust); *In re McManaman*, 50 F. Supp. 869 (N.D.

Ill. 1941) (refusing to turn over to bankruptcy trustee debtor's interest in federally created retirement system trust).

Thus, it is clear that ERISA pension plans would not have been included in the bankruptcy estate under pre-Code practice. Congress did not indicate an intent to change this practice. In fact, the legislative reports agree that Code § 541 preserved the pre-Code practice.[12] Petitioner argues that the change in the strategy of Code § Section 541(a) (which includes all property not specifically excluded) from the previous practice under the Bankruptcy Act (by which what was included in the estate was specifically defined) evidences a substantial change in the pre-Code practice and that the approach to the interpretation of Code § 541(c)(2) should therefore take into account such change. Certainly, Congress did change the procedure by which the debtor's estate is created; it also changed some of the kinds of assets to be excluded from the estate. *Compare* 11 U.S.C. § 110(a)(5) (repealed 1978) *with* 11 U.S.C. § 541(c)(1). What Congress did not change, however, is the result with respect to trusts with anti-alienation provisions. The exclusion for non-transferable trusts was clearly carried forward in Code § 541(c)(2), which allows the court to enforce restrictions on the transfer of beneficial interests enforceable under "applicable nonbankruptcy law." Petitioner's contention that the change in Code § 541(a) to create an all-inclusive estate indicates that ERISA pension plans should not be excluded from the debtor's estate is erroneous, because the Petitioner has focused solely on the mechanics of this section. ERISA pension plans should be excluded from the estate under § 541(c)(2) because ERISA's anti-alienation provision is "applicable nonbankruptcy law."

[12] *See* S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5869; H.R. Rep. No. 595, 95th Cong., 2d Sess. 176 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6325.

B. Code § 522(d)(10)(E) applies to more than employee pension plans, so that not all benefits which would be exempted under that Code section would be excluded under the applicable nonbankruptcy law exclusion of Code § 541(c)(2).

Not all bankrupts can avail themselves of the exemption scheme set forth in Code § 522(d) since some states, including Virginia, have opted-out of that exemption scheme. Even in those states which have not opted-out, those exemptions are not available if the debtor elects the state exemptions under Code § 522(b)(2).[13]

The exclusion under Code § 541(c)(2) operates solely with respect to pension plans, while the exemption under Code § 522(d)(10)(E) encompasses many more employee benefits plan and payment arrangements. To completely understand the structure and scope of that section, its precise language must be analyzed. The statute exempts the debtor's right to receive the following property:

> (E) a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor unless—
>
> (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
>
> (ii) such payment is on account of age or length of service; and
>
> (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the

[13] Petitioner misapprehends the interplay between the state and federal exemption provisions of the Code by contending that *only* the federal exemptions are available in non-opt-out states, when, in fact, residents of those states have a choice between federal and state exemptions. See Petitioner's Brief, pp. 16-18, and pp. 50-55.

Internal Revenue Code of 1954 (26 U.S.C. §§ 401(a), 403(a), 403(b), 408, or 409.)

Code § 522(d)(10)(E) (emphasis added). This section clearly exempts interests in employee benefit plans that would not qualify as pension plans. It encompasses plans that are not excluded under Code § 541(c)(2) pursuant to ERISA's anti-alienation provision. Therefore, basically all employee benefit plans (including those which do not qualify as pension plans) are subject to this exemption, except for those plans which were established by an insider and which do not qualify under the enumerated sections of the Internal Revenue Code. The sole reference in that section to a "qualified plan" is in Code § 522(d)(10)(E)(iii), which is part of the exception, thereby depriving a non-qualified plan of the exemption if it was established by an insider (an essentially self-settled plan) and the benefits were calculated on the basis of age or length of service. Plans which qualify under the enumerated Internal Revenue Code sections are all governed by limits on the annual amount which can be contributed.[14] Seen in that light, the reason for the exception from the exemption becomes clear—to prevent the establishment by insiders of plans which have the opportunity to receive unlimited contributions at any time. The section is not, as Petitioner would urge, limited to interests governed by ERISA's anti-alienation provision. *See In re Threewitt*, 24 B.R. 927 (Bankr. D. Kan. 1982). In fact, not all plans listed in Code § 522(d)(10)(E)(iii) are plans subject to ERISA's anti-alienation provision by virtue of being governed by Title I of ERISA.[15]

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[14] *See e.g.*, IRC §§ 410 & 415.

[15] Pursuant to ERISA § 4(b), simplified employee pensions, government plans, and certain church plans are not employer plans within the meaning of ERISA § 4(a) and thus are not subject to several provisions of ERISA which apply to other pension plans; *e.g.* ERISA § 206(d)(1) and the preemption provisions of ERISA § 514(a).

II. ERISA § 206(d)(1) constitutes an exemption under the other federal law language of Code § 522(b)(2)(A) which the debtor may claim, thereby precluding alienation of the debtor's interest in an ERISA plan.

A. ERISA § 206(d)(1) constitutes a federal exemption in bankruptcy.

Bankruptcy Code § 522(b)(2)(A) creates an exemption for assets exempted "under Federal law." Even if the Court determines that Code § 541(c)(2) does not exclude ERISA plan assets from the bankruptcy estate, the anti-alienation provision of ERISA nonetheless provides an exemption under this "other federal law" language of § 522(b)(2)(A).

An exemption is a "privilege allowed by law to a judgment debtor, by which he may hold property to a certain amount or certain classes of property, from all liability to levy and sale on execution or attachment." *In re Komet*, 104 B.R. at 806 *(quoting* Black's Law Dictionary 513 (5th ed. 1979)). The body of federal common law developed under ERISA clarifies "that ERISA § 206(d) effectively operates as an exemption for covered plan benefits." *In re Komet*, 104 B.R. at 806-07. The holdings in *Mackey* and *Guidry* establish that the language in ERISA does not merely set up guidelines to qualify pension plans for tax exempt treatment, but sets up an explicit federal exemption protecting pension benefits from alienation.

B. The structure of the Bankruptcy Code demonstrates a strong congressional policy favoring application of ERISA § 206(d)(1).

1. The Bankruptcy Code has not repealed ERISA § 206(d)(1).

The Bankruptcy Code contains no provision repealing any part of ERISA. *See* Bankruptcy Code, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549, 2682 (1978) (repealing the Bankruptcy Act). It is a settled rule of law that there is a presumption against repeal by implication. *Graham v. Goodcell*, 282 U.S. 409, 425 (1931). Similarly, a court may not repeal by implication if it is possible to harmonize the

statutes. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *United States v. Burroughs*, 289 U.S. 159, 164 (1933).

Moreover, the use of legislative history to dilute ERISA's anti-alienation provision disregards established principles of statutory construction. This Court has repeatedly emphasized the long-standing rule that resort to legislative history to construe an unambiguous statute is inappropriate. *United States v. Ron Pair Enterprises*, 498 U.S. at 241-42. If Congress intended to exclude ERISA plans from "other federal law" exemption of Code § 522(b)(2)(A), it would have certainly done so in the Bankruptcy Code itself.

2. The legislative history to Code § 522(b)(2)(A) is insufficient to support an implicit repeal of ERISA § 206(d)(1).

Petitioner attaches great significance to the omission of ERISA from the illustrative list of Code § 522(b)(2)(A) exemptions included in the Bankruptcy Code's legislative history. In light of the unambiguous face of the Code, however, resort to the Bankruptcy Code's legislative history is improper. In addition, it is inappropriate to rely upon illustrative lists in the legislative history to add a limitation to one statute and effectively repeal another statute. *Pension Benefit Guar. Corp. v. LTV Corp.*, — U.S. —, 110 S. Ct. 2668, 2677 (1990).

The legislative history itself demonstrates that the list of exemptions was not exclusive.[16] If Congress had desired to limit other federal law to only certain federal laws, it would have done so by incorporating the list into the statute and making it "exclusive" as opposed to "illustrative." It is a "non-sequitur to say that the failure to include

[16] H.R. Rep. No. 595, 95th Cong., 2d Sess. 360 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6316 ("If the debtor chooses [sec. 522(b)], some of the items that may be exempted under other federal laws include . . . ."); S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5861 ("Some of the items that may be exempted under federal laws other than title 11 include . . . .").

something on an illustrative list is probative of an intent to exclude it from that list." *In re Komet*, 104 B.R. at 815.

Petitioner's reliance upon the legislative history's omission of ERISA is further undercut by the mistakes contained within the legislative history. The illustrative list contains two statutory provisions that were repealed prior to 1978 when the Bankruptcy Code was enacted, namely, civil service benefits (repealed in 1966) and foreign service benefits (repealed in 1974). Similarly, the list misnames veterans benefits as Congressional Medal of Honor benefits. *See In re Burns*, 108 B.R. 308, 315 n.7 (Bankr. W.D. Okla. 1989).

This Court has also previously recognized that the omission of ERISA from the illustrative list does not make it any less a federal exemption on par with the exemptions on the illustrative list. Noting that ERISA's anti-alienation provision is "consonant with other statutory provisions designed to safeguard retirement income," the Court then footnotes several statutes which are contained in the illustrative list. *Guidry*, 493 U.S. at 838, n.13.

In point of fact, the legislative history of Code § 522(b)(2)(A) strongly supports the operation of ERISA § 206(d)(1) in the bankruptcy context and belies the Petitioner's interpretation. In drafting Code § 522 Congress embraced the basic exemption scheme of § 6 of the Bankruptcy Act, which honored exemptions existing outside of bankruptcy, and then added an alternative set of exclusively federal exemptions. 11 U.S.C. § 24 (repealed 1978). Section 6 of the Bankruptcy Act permitted debtors to take advantage of all the exemptions available under both the laws of the United States and the laws of the state in which the debtor filed. This provision was reenacted in the Bankruptcy Code as § 522(b)(2)(A), substantially without change. The exclusively federal exemption scheme added by Congress was enacted under Code § 522(d), and is indepent from the exemption scheme under Code § 522(b)(2)(A). Congress' "substantial reenactment of

Section 6 of the Act in Section 522(b)(2)(A) indicates that Congress there also intended to continue prior law, which simply incorporated by reference such federal exemptions as might otherwise be available to the debtor absent bankruptcy." *In re Komet*, 104 B.R. at 813.

C. There is no conflict between Code § 522(b)(2)(A) and § 522(d)(10)(E).

Petitioner attempts to explain why Code § 522(b)(2)(A) does not include the ERISA's anti-alienation provision within its ambit by setting up a non-existent conflict between that section and Code § 522(d)(10)(E). Congress provided debtors an election to choose between (1) the exemption scheme which includes state law exemptions and exemptions under federal law other than under the Bankruptcy Code (the 522(b) scheme), or (2) the exemption scheme established under the Bankruptcy Code (the 522(d) scheme).[17] Accordingly, two separate and free-standing exemption schemes exist under the Bankruptcy Code. Ignoring that fact, Petitioner erroneously states that exempting ERISA pension plans under the 522(b) exemptions would render the 522(d) exemptions "without a purpose or create inconsistent federal pension exemptions in bankruptcy." Petitioner's Brief, p. 50.

There is no conceivable way that the application of the 522(b) exemptions to pension plans can render the 522(d) exemptions without a purpose since the 522(b) exemptions *cannot* apply when the 522(d) exemptions are elected, and vice-versa. If Petitioner's position were correct, there would be a "reasonable needs" exemption when the 522(d) scheme was elected, and *no* exemption when the 522(b) scheme was elected. This result clearly is not countenanced under the policy expressed in this Court's holding in both *Mackey* and *Guidry*.

Admittedly, the existence of these two schemes creates different exemptions. It would be remarkable and unnecessarily duplicitous if both exemption schemes exempted precisely the same assets to precisely the same extent. Therefore, the inconsistencies to which Petitioner points are ones of quantity and scope, an understandable distinction between two distinct statutory rules. While the 522(d) scheme exempts only the portion of a pension plan "reasonably necessary for . . . support," its scope is much broader than just pension plans. The 522(b) scheme exempts all of the debtor's interest in a pension plan, but is limited only to pension plans. This is just another example of the careful balances struck by Congress in formulating the exemption schemes.

[17] Congress also permitted the states to mandate that only the 522(b) scheme would be available to its residents. Code § 522(b)(1).

Additionally, some courts have held that the Code § 522(d) scheme limits the exemption to payment or distribution rights (benefits in "pay status"). *See, e.g., In re Harline*, 950 F.2d 669; *Velis v. Kardanis*, 949 F.2d 780.

Both the § 522(b) and the § 522(d) exemption schemes, although in differing fashions and degrees, protect retirement benefits from creditors within and outside of bankruptcy. There was simply no reason for Congress to further complicate the Bankruptcy Code by taking pains to insure that there was no overlap between mutually exclusive exemption schemes. *See, e.g., In re Threewitt*, 24 B.R. 927.

III. CONGRESS HAS ALREADY ENUNCIATED A STRONG PUBLIC POLICY IN FAVOR OF THE PROTECTION OF RETIREMENT BENEFITS AND HAS CHOSEN NOT TO DISCRIMINATE BETWEEN THOSE EXERCISING DOMINION AND CONTROL AND THOSE NOT EXERCISING DOMINION AND CONTROL.

If Petitioner fails, as he should, to convince this Court that the acts of Congress do not exclude or exempt the pension benefits of a debtor, then Petitioner would seek to persuade the Court that it should engraft a public policy onto ERISA and the Bankruptcy Code that was not enunciated by Congress. Congress has adopted a public policy strongly in favor of the protection of pension benefits, and has construed the Bankruptcy Code to provide debtors a fresh start. The "fresh start" for younger persons may

be to allow them to come through bankruptcy with their home, their personal possessions, their pension benefits that have already accrued, and their earning capacity. For an older bankrupt, the sole basis for his or her fresh start may be the accrued pension benefits, whether in pay status or not, accumulated over a lifetime of labor.[18] Congress surely did not intend to discriminate on the basis of age. In fact, Congress moved strongly in the other direction and explicitly put pension plans beyond the reach of the creditors of the participant. Although not involving a debtor in bankruptcy, this Court has recognized the strong public policy behind the enforcement and protection of ERISA's anti-alienation provision, by holding that:

> Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.
>
> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an anti-garnishment provision. Such a provision acts, by definition, to hinder the collection of lawful debt. A restriction on garnishment therefore can be defended *only* on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable.

Guidry, 493 U.S. at 376-77 (emphasis in opinion). Although *Guidry* is not a bankruptcy case, the clear public policy

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[18] *See* Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W. Va. L. Rev. 411, 461-62 (1991-92).

recognized and articulated by the Court should be recognized both within and without bankruptcy. To have the result changed because a creditor was able to force a debtor into involuntary bankruptcy (or because the debtor voluntarily sought the fresh start permitted under the law) comports with neither law nor logic. Congress has enunciated its policy, and this Court should not be asked to create a different one.[19]

IV. IF THE COURT HOLDS IN FAVOR OF PETITIONER, THEN IT STILL LEAVES OPEN MANY QUESTIONS WHICH WILL FOSTER CONTINUING LITIGATION AND IT EFFECTIVELY NULLIFIES THE NATIONAL SCHEME ERISA SOUGHT TO IMPLEMENT.

A. If the Bankruptcy Code does not exclude or exempt the interest of a debtor in a pension plan, then the bankruptcy courts will be forced to determine whether such interests are excluded under state spendthrift trust law.

State spendthrift trust law will protect a trust which contains spendthrift provisions only to the extent that the settlor who is also a beneficiary did not retain such dominion and control that the trust is essentially an alter-ego of the settlor. The courts have had no trouble finding that pension plans established by a closely-held corporation were in effect established by its controlling shareholder. However, experienced trust counsel cannot help but stand in amazement at the bankruptcy courts' lack of understanding as to the extent of dominion and control required before a spendthrift trust should be considered self-settled. For example, the bankruptcy courts have relied upon a series of factors that are not truly relevant under classic spendthrift trust law. In some cases, the bankruptcy courts have found the requisite dominion and control because an

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[19] In fact, all but eight of the states have adopted a clear public policy to protect pension plans by adopting state statutes which exempt such plans. For an analysis of such statutes see Golden, *What Have We Stepped Into? Qualified Plans in Bankruptcy*, 17 ACTEC NOTES 186, 195 (1991).

employee who was not an owner could receive his or her interest in the plan by terminating employment.[20] In one particularly egregious case using that test, the bankruptcy court found that the plan of Trans-World Airline was not a spendthrift trust as to a pilot for that airline. *In re Gallagher*, 101 B.R. 594 (Bankr. W.D. Mo. 1989). Other indicia applied by the bankruptcy courts to trusts which were not established by the controlling shareholder have been the presence of direct employee contributions,[21] the presence of loan provisions even though no borrowing could be had without the approval of the plan administrator,[22] and the presence of the ability of the plan administrator to make hardship distributions.[23] Because of the wide variety and inconsistency of bankruptcy court determinations as to what constitutes a spendthrift trust under state law, the national scheme of ERISA is frustrated, plan administrators are asked to accept an unreasonable burden, and different debtors located within different states (or sometimes different federal districts within the same state) will be treated differently.[24]

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[20] The court in *Goff* wrote that termination of employment was an act of such independent significance that it was not an indicia of dominion and control. *Goff*, 706 F.2d at 589. That has not stopped the bankruptcy courts from applying that test. *In re Sheppard*, 106 B.R. 724 (Bankr. M.D. Fla. 1989); *In re Silldorff*, 96 B.R. 859(Bankr. C.D. Ill. 1989); *In re Loe*, 83 B.R. 641 (Bankr. D. Minn. 1988).

[21] *In re Swanson*, 873 F.2d 1121 (8th Cir. 1989). Some courts have even held that funding by the employer is made with what would have been employee wages, and that the employees therefore indirectly made the contribution. *In re Weeks*, 106 B.R. 257 (Bankr. E.D. Okla. 1989).

[22] *In re Silldorff*, 96 B.R. 1014.

[23] *Id.*

[24] Such a result has already occurred in several states. *Compare In re Bryan*, 106 B.R. 749 (Bankr. S.D. Fla. 1989) *with In re Bryant*, 106 B.R. 727 (Bankr. M.D. Fla. 1989) and *In re Sheppard*, 106 B.R. 724. *Compare In re Burns*, 108 B.R. 308 *with In re Brown*, 95 B.R. 216 (Bankr. N.D. Okla. 1989).

B. A majority of states have enacted statutes which provide a state law exemption for pension plans. Several courts have held that such statutes are preempted by ERISA, and thus fail to provide the protection contemplated by the state legislature. If pension plans are neither excluded nor exempt under federal law, then the preemption question will still be open, and debtors in different jurisdictions will be treated differently, thereby frustrating ERISA's national scheme.

Two courts of appeals have recently determined that state laws exempting pension benefits ("shield laws") from claims of creditors are not preempted by ERISA on the theory that state exemption schemes are necessary for the operation of the Bankruptcy Code. *See Heitkamp v. Dyke (Matter of Dyke)*, 943 F.2d 1435 (5th Cir. 1991); *Checkett v. Vickers*, ___ F.2d ___, 1992 WL 9491 (8th Cir. 1992). However, in states without shield laws, or in jurisdictions which hold that shield laws are preempted by ERISA § 514(a), the debtor enjoys no protection for the debtor's pension benefits despite the announced federal scheme of ERISA. Those questions would be made moot by a finding that the pension benefits are excluded (or if not excluded, exempted) under the construction of the Bankruptcy Code urged by Respondent.

C. Even if the Court decides that pension plan benefits are neither exempt nor excluded, the question as to whether the debtor's interest in the plan must be surrendered to the trustee in bankruptcy will still remain unanswered, thereby fostering more litigation.

In the case at bar, the employer's plan has been terminated and the amount of Respondent's interest in the plan has been determined and placed in escrow. However, most plans will not have been terminated, and the question will arise as to whether, since the debtor could not reach the benefit, the plan administrator is required to turn the asset over to the trustee under Code § 542. Courts have

disagreed as to whether the trustee has greater rights than the debtor or whether the trustee must wait for the time the debtor would receive distribution. In the latter case, the trustee cannot practically dispose of the interest immediately, and the Code's policy of speedy resolution will be frustrated if the case is kept open. *See In re Loe,* 83 B.R. 641 (holding that the trustee could not force an immediate turnover); *In re Deweese*, 47 B.R. 251 (Bankr. W.D.N.C. 1985).

D. The Internal Revenue Service has taken a position that could result in a disqualification of the entire plan if the assets of one participant are ordered to be turned over to the trustee.

The Internal Revenue Service, in private letter rulings, has determined that a plan breaches the anti-alienation rules under IRC § 401(a)(13) (the IRC counterpart to ERISA § 206(d)(1)) and thereby is disqualified from favorable tax treatment if the plan administrator complies with a turnover order. Priv. Ltr. Rul. 90-11-037 (Mar. 16, 1990); Priv. Ltr. Rul. 89-51-067 (Dec. 22, 1989); Priv. Ltr. Rul. 89-10-035 (Mar. 18, 1989). Even though IRC § 6110(j)(3) prohibits the use of private letter rulings as precedent, they are nonetheless indicative of the Internal Revenue Service's position. While some bankruptcy courts have held that the plans will not be disqualified, the Internal Revenue Service was not a party to those proceedings, and can hardly be held to be bound thereby. *See, e.g., In re Gallagher*, 101 B.R. 594; *In re Deweese*, 47 B.R. 251. No case has directly litigated the correctness of the Internal Revenue Service's announced position. The authority to determine tax liability under Code § 505 does not extend to the determination of the tax liability of the bankrupt's employer and the participants in the plan other than the bankrupt.

CONCLUSION

Congress has set forth its public policy that a debtor should be entitled to a fresh start under the Bankruptcy

Code and that part of that fresh start should include the debtor's interest in an employee pension plan as defined in ERISA. This policy is a necessary adjunct to the overriding public policy of ERISA—to provide a uniform federal scheme which will ensure the retirement benefits of working Americans from every walk of life.

ERISA's anti-alienation provision, as recognized by this Court in *Guidry*, is the cornerstone of these policies. Congress effectuated these policies by maintaining the exclusion for trusts subject to a restraint on alienation under federal and state law, thereby excluding trusts subject to ERISA's anti-alienation requirement from the bankruptcy estate. Alternatively, ERISA's anti-alienation provision should be held to constitute an exemption under federal law other than the Bankruptcy Code. The wisdom of those public policies is not a question for the Court. If the public policy is to be changed, Congress should change it. Congress recognized that any other policy would subject the pension benefits of retirees to the caprices of the various states, with the bankruptcy courts in many cases putting their own spin on state law in order to resolve exemption and exclusion questions. Finally, the Internal Revenue Service's position that entire plans will be disqualified if the debtor's interest is not exempt cannot be overlooked. Surely, Congress could not have intended that the financial misfortunes of one participant could result in the direst of tax effects for all others.

Petitioner's positions stand the law on its head and logic on its ear. The College urges this Court to give to the statutes their obvious interpretation in order to carry out the express Congressional intent and thereby to set the law aright.

This the 3rd day of April, 1992.

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No. 91-913

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN R. PATTERSON,
Petitioner,
v.
JOSEPH B. SHUMATE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the American Society of Pension Actuaries ("ASPA") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to affirm the decision below that a debtor's interest in an ERISA tax-qualified pension plan is excluded from property of the debtor's bankruptcy estate under 11 U.S.C. § 541(c)(2). ASPA also respectfully urges this Court to hold that the anti-alienation provisions in ERISA and the Internal Revenue Code, 29 U.S.C. § 1056(d)(1) and I.R.C. § 401(a)(13)(A), constitute "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), as well as "Federal law" under 11 U.S.C. § 522(b)(2). In addition, ASPA respectfully

urges this Court to hold that the antialienation provisions in ERISA and the Internal Revenue Code protect all pension benefits from all ERISA tax-qualified plans, without regard to a pension plan participant's economic stature or employment status. Respondent has consented to the filing of this brief; Petitioner has not.

ASPA is a nonprofit organization whose purpose is to educate pension plan professionals and to preserve and enhance the private pension system. The membership of ASPA consists of nearly 3,000 individuals who provide actuarial, consulting, and administrative services to approximately 30% of the tax-qualified retirement plans in the United States. The members of ASPA, like the pension plans they serve, are located throughout the United States. These plans are representative of all of the nation's tax-qualified retirement plans, which cover tens of millions of American workers. Reversal of the decision below will have an adverse impact on all tax-qualified pension plans, including those plans served by ASPA's membership.

Because of the broad range of experience of ASPA's constituency and its close, ongoing contacts with thousands of fiduciaries charged with operating retirement plans and thousands of large and small businesses that maintain these plans, ASPA believes that it is uniquely qualified to state the position of those who maintain and administer these plans, as well as the participants and beneficiaries of these plans.

In the instant case, we respectfully request this Court to affirm the decision below that retirement plan assets are meant to provide benefits to plan participants when they retire, not to be assigned to retirees' creditors in bankruptcy court. Reversal of the decision below would have far-reaching negative consequences for the effective administration of retirement plans and would undermine the retirement system that Congress has sought to bolster through the passage of the Employee Retirement Income Security Act of 1974 and subsequent amendments thereto.

ASPA will limit its discussion to the consistency between the decision below and the legislative histories of ERISA, the Retirement Equity Act of 1984, and the Bankruptcy Code priority for employee benefit plans—matters not addressed by the parties. ASPA's brief focuses on the Congressional intent to ensure that retirement benefits would be provided, not lost, in times of economic hardship.

Based on the foregoing, ASPA respectfully moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF AMERICAN SOCIETY OF PENSION ACTUARIES IN SUPPORT OF RESPONDENT

INTRODUCTION

The American Society of Pension Actuaries ("ASPA") submits this brief *amicus curiae* to urge the Court to affirm the holding below that bolsters the fundamental premise upon which pension plans are established and administered: that the assets of tax-qualified pension plans cannot be assigned or alienated to a plan participant's creditors.

INTEREST OF ASPA

The nature and purpose of ASPA is set forth in the accompanying motion for leave to file this brief. ASPA submits that a failure to affirm the decision below will undercut the purpose and structure of retirement plans.

To adopt the position of the Petitioner is to reject the Congressional directive to encourage the establishment and maintenance of pension plans to provide pension benefits to plan participants. *See* 29 U.S.C. §§ 1001, 1104(a)(1)(A).

The Congress, familiar with the way in which retirement plans operate, enacted ERISA in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans," 29 U.S.C. § 1001(a). Neither in ERISA nor its subsequent amendments did Congress choose to make retirement plan assets available to pay plan participants' creditors. The corpus of a tax-qualified retirement plan is maintained to provide benefits for all plan participants—whether they are highly compensated or rank and file. As a national representative of those who provide services to retirement plans, ASPA submits that reversal of the decision below would impair the viability of all retirement plans.[1]

SUMMARY OF REASONS FOR AFFIRMANCE

The legislative history of the Employee Retirement Income Security Act evidences an overriding Congressional concern that a pension plan participant's actual receipt of earned retirement benefits should not be subjected to the winds of financial misfortune. *See* 29 U.S.C.

[1] Counsel has been authorized to represent to the Court that the National Coordinating Committee for Multiemployer Plans ("NCCMP") supports the positions espoused by ASPA in this brief. The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of ERISA to represent the interest of multiemployer pension and welfare plans and their participants in the development of employee benefit legislation and government regulations under ERISA and other laws affecting employee benefits. Currently, more than 190 multiemployer plans (and related international unions), which plans are representative of all of the nation's multiemployer plans covering more than nine million workers, are affiliated with the NCCMP.

§ 1001(a). This intent is expressly embodied, among other places, in ERISA's minimum vesting and funding requirements, 29 U.S.C. §§ 1053 and 1082, as well as ERISA's express prohibition against the alienation of pension benefits, 29 U.S.C. § 1056(d). The protections against alienation, which ERISA affords to pension plan participants' benefits, are not limited to the benefits of rank and file employees, highly compensated employees, and/or substantial owners, even though Congress saw fit to distinguish among these kinds of pension plan participants for other purposes, *e.g.*, 29 U.S.C. §§ 1322(b)(5), 1342(a)(3) and I.R.C. § 401(a)(26).

The Congressional concern that pension benefits must be funded so that participants will actually receive benefits, is reiterated in the legislative history of the Bankruptcy Reform Act of 1978 and reinforced through that statute's express provisions, 11 U.S.C. § 507(a)(4). Since the passage of ERISA in 1974, Congress has only once chosen to modify ERISA's prohibition against the alienation of pension benefits, which Congress refers to as ERISA's "spendthrift" rules. That choice was made in 1984 under the Retirement Equity Act, which permits the alienation of benefits for spousal support and maintenance under certain limited circumstances. Congress has not chosen to legislate the alienation of pension plan assets for the benefit of pension plan participants' creditors. We respectfully submit that this Court should not do so, either.

REASONS FOR AFFIRMANCE

ASPA respectfully requests that this Court consider the legislative history of ERISA (and subsequent amendments thereto) and the legislative history of Section 507 of the Bankruptcy Code, which demonstrates a Congressional intent to ensure that retirement benefits are actually paid to retirement plan participants. While we concur with the position espoused by the Respondent, in

compliance with the spirit and letter of this Court's Rule 37, we seek affirmance of the decision below by bringing to the Court's attention information not presented by the parties.[2]

LEGISLATIVE HISTORY OF ERISA

The Employee Retirement Income Security Act of 1974 was forged in the fire of business failure, most notably that of the Studebaker Division of Studebaker Packard, when more than 4,000 workers lost their jobs and got only 15% of the pensions they had earned. I *Legislative History of the Employee Retirement Income Security Act of 1974*, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Comm. Print 1976) (hereinafter "Legis. Hist." ——) at 208 (remarks of Sen. Ribicoff). An additional 2,900 Studebaker employees were left with absolutely nothing. I Legis. Hist. at 214 (remarks of Sen. Bentsen). The legislative history of ERISA brims with the tragedy of individual ruin resulting from the loss of pension benefits. S. Rep. No. 127, 93d Cong., 1st Sess. at 9-10, *reprinted in* I Legis. Hist. at 595-96. ERISA's "basic goal is to assure workers that they will receive the promised pension benefits earned for their retirement. . . ." II Legis. Hist. at 1599 (remarks of Sen. Williams) describing, *inter alia*, the loss of not only jobs, but also pensions when Raybestos shut down).

[2] If this case and the issues presented are to turn on the plain statutory language, there is no question but that Respondent prevails, because ERISA and the Internal Revenue Code (including their provisions prohibiting the alienation of retirement benefits) are "Federal law," 11 U.S.C. § 522(b)(2)(A), and are "applicable nonbankruptcy law," 11 U.S.C. § 541(c)(2). However, the parties and the federal courts, which have addressed these issues, have gone beyond the plain language, even though some have remembered to return to it.

Under ERISA and the Internal Revenue Code, Congress intended to ensure that participants would receive the benefits they earned through required minimum vesting and funding rules. "To further ensure that the employee's accrued benefits are actually available for retirement purposes, the committee bill also contains a provision requiring the plan to provide that benefits may not be assigned or alienated. (Of course, this provision is not intended to prevent the transfer of benefit rights from one qualified plan to another)." H. Rep. No. 779, 93d Cong., 2d Sess. at 66, *reprinted in* II Legis. Hist. at 2655.

This legislative history describing the purpose of the antialienation provisions in ERISA and the Internal Revenue Code was repeated throughout the legislative consideration of ERISA. *E.g.*, H. Rep. No. 807, 93d Cong., 2d Sess. at 68, *reprinted in* II Legis. Hist. at 3188; Explanation of H. Rep. 12906 to accompany H. Rep. 2, *reprinted in*, II Legis. Hist. at 3323. Further elaboration on the antialienation provision evidences the Congressional "understand[ing] that many plans provide for payments of premiums for supplemental hospital benefits (under the Social Security Act) and this provision is intended to specifically permit such alienation." H. Rep. No. 779, 93d Cong., 2d Sess. at 67. Similarly, "[t]his provision is not intended to interfere with the current practice in many plans of using vested benefits as collateral for reasonable loans from the plans." *Id.*

Nowhere in ERISA or its legislative history is there a hint that there was any intent to establish a practice that employee benefits should be assigned or alienated for the benefit of a participant's creditors. To the contrary, "[t]he primary purpose of the bill is the protection of individual pension rights. . . . In addition to the minimum participation, vesting, and funding standards provided in the bill, your committee has adopted a number of specific provisions to protect the rights of employees nad [sic] beneficiaries under qualified plans. . . . Quali-

fied plans must provide that retirement benefits may not be assigned or alienated. . . ." Report of Committee on Education and Labor to accompany H. Rep. 2 (Cong. Rec. Feb. 25, 1974), *reprinted in* II Legis. Hist. at 3294.

In the same vein, Congress intended that "no rights, once they are required to be vested, may be lost by the employee under any circumstances. . . . Some plans also provide that an employer may have lien rights against an employee interest in a pension plan. These clauses would also be prohibited. . . ." *Id.* at 3327.

Finally, the Joint Explanatory Statement of the Committee of Conference on ERISA states: "[A] plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10% of any benefit payment) by an employee. . . . For purposes of this rule, a garnishment or levy is not to be considered a voluntary assignment." H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. at 280.

In addition to ERISA's and the Internal Revenue Code's antialienation provisions, ERISA requires that plan fiduciaries use plan assets "for the exclusive purpose of providing benefits to participants and their beneficiaries," ERISA § 404(a)(1)(A)(i). Nowhere in ERISA or its legislative history is there a hint that Congress wanted to ensure that participants received their pension benefits even if their employer suffered financial failure, but that Congress did not want participants to receive their pension benefits if they suffered personal financial failure.

Nowhere in the findings and declaration of policy of ERISA, 29 U.S.C. § 1001, is there any evidence that Congress intended to ensure that retirement benefits would accrue, vest, and be funded for the benefit of a pensioner's creditors.

THE LEGISLATIVE HISTORY OF THE BANKRUPTCY REFORM ACT

In drafting the Bankruptcy Reform Act of 1978, Congress reiterated its concern that employee benefit plans be funded so as to be able to provide promised pension benefits. Bankruptcy Code Section 507(a)(4) "overrule[d] *United States v. Embassy Restaurant*, 359 U.S. 29 (1959) which held that fringe benefits were not entitled to wage priority status. The [Bankruptcy Reform Act] recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans. . . ." S. Rep. No. 989, 95th Cong., 2d Sess. at 69, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855. It defies logic to conclude that Congress intended with one hand to create a bankruptcy priority to fund pension plans (at the expense of nonpriority general unsecured creditors), thereby ensuring adequate assets to provide retirement benefits, while with the other hand it was taking those retirement benefits and redistributing them to the retiree's creditors. Federal statutes should be construed harmoniously, *Morton v. Mancari*, 417 U.S. 535, 551 (1974); they should be read as an integrated whole, not as isolated parts, *United States v. Morton*, 467 U.S. 822 (1984).

LEGISLATIVE HISTORY OF THE RETIREMENT EQUITY ACT

The Petitioner, like those federal circuits which do not find Bankruptcy Code Section 541(c)(2) to mean what it says, makes much of the reference to "spendthrift" trusts in the legislative history of the Bankruptcy Reform Act of 1978. However, those courts and the Petitioner overlook the fact that Congress had concluded that the antialienation provisions in ERISA and the Internal Revenue Code, in fact, were "spendthrift"

provisions. "Generally under present law, benefits under a pension . . . plan are subject to prohibitions against assignment or alienation. . . . A plan that does not include these required spendthrift provisions is not a qualified plan under the [Internal Revenue] Code. . . . The [C]ommittee [on Finance] believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc., plan to be divided under certain circumstances [involving qualified domestic relations orders for support and/or maintenance]." S. Rep. No. 575, 98th Cong., 2d Sess. at 18-19, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2564-65.

In establishing the antialienation or federal "spendthrift" rules under ERISA in 1974, and in establishing a limited exception of those rules under the Retirement Equity Act of 1984, Congress did not distinguish among plan participants—that is, the rules applying to rank and file participants as well as to salaried participants; the rules apply to solvent participants as well as to insolvent participants. Congress has chosen to differentiate for certain purposes among highly compensated employees and collectively bargained employees, *e.g.*, I.R.C. §§ 401 (a)(26) and 410(b), and to differentiate between participants who are substantial owners and those who are not, *e.g.*, ERISA Sections 4022(b)(5), 4042(a)(3), and 4043(b)(7). However, Congress has not made that distinction with respect to the federal antialienation/spendthrift policy, expressed in the provisions of ERISA and the Internal Revenue Code. "If exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 376 (1990).

Congress has not chosen to establish a policy that would deny pension benefit protection for the owners of small businesses, but would extend that protection to the executives and significant shareholder employees of large corporations. Similarly, Congress has not chosen to establish a related policy that would result in the disqualifica-

tion of pension plans established or maintained by small businesses simply because the owner, who is also a pension plan participant, was in financial distress and had to seek relief under the Bankruptcy Code. We respectfully submit that neither should this Court establish such a policy.

In *Guidry*, this Court protected the retirement benefits of an embezzler and held that ERISA's nonalienation requirement "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." 493 U.S. at 370. A *fortiori*, ERISA's nonalienation requirement should protect the retirement benefits of a plan participant who has fallen on hard times. In *Guidry*, this Court held that ERISA's antialienation provision meant what it said: "We see no meaningful distinction between a writ of garnishment and the constructive trust remedy imposed in this case," 493 U.S. at 372. Similarly, we see no meaningful distinction between a writ of garnishment and a turnover order under Bankruptcy Code Section 542, demanding that a pension plan fiduciary make plan assets available for the benefit of a participant's creditors in violation of ERISA Sections 206(d)(1) and 404(a)(1)(A) and in violation of the parallel provision in the Internal Revenue Code, *i.e.*, Section 401(a)(13)(A).

The Internal Revenue Service also sees no meaningful distinction with respect to a decision to alienate participant's pension benefits: "It is the view of the Internal Revenue Service that [Internal Revenue Code] Section 401(a)(13) provides, at this time, the exclusive and definitive law on alienability of pension benefits in bankruptcy proceedings." P.L.R. 9109051 (Dec. 5, 1990).[3]

[3] Although IRS private letter rulings may not be used as precedent, *see* I.R.C. § 6110(j)(3), those rulings are entitled to some

See P.L.R. 8910035 (Dec. 9, 1989). The Internal Revenue Service, in P.L.R. 9109051 (Dec. 5, 1990), takes the position that compliance with a Bankruptcy Code Section 542 order from a trustee in bankruptcy to turn over the value of a participant/debtor's interest in a pension plan will result in disqualification of the plan due to noncompliance with I.R.C. § 401(a)(13).

Treas. Reg. § 1.401(a)-13(c)(1)(ii) provides that "assignment and alienation" include any direct or indirect arrangement under which a party acquires from a participant "a right or interest enforceable against the plan in . . . any part of a plan benefit payment which is, or may become, payable to the participant. . . ." *Id.* In reaching its conclusions, the Internal Revenue Service relies on the legislative history of the antialienation provision, which states that its purpose is to protect pension benefits "against the claims of general creditors," P.L.R. 9109051, *citing*, H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 280 (1974), and to "further ensure that the employee's accrued benefits are actually available for retirement purposes," H. Rep. No. 807, 93d Cong., 2d Sess. 68 (1974).

Finally, we note that the legislative history of the Bankruptcy Reform Act lists "*some* of the items that may be exempted [from the debtor's estate] under Federal laws other than title II. . . ." *Id.*, S. Rep. No. 989 at 75. The list includes the Social Security Act, the Railroad Retirement Act, the Civil Service Act, and the Veterans' Benefit Act. This Court listed those same federal laws in holding that ERISA is "consonant with other statutory provisions designed to safeguard retirement income." *Guidry*, 493 U.S. at 372.

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weight. *Amato v. Western Union International*, 773 F.2d 1402 (2d Cir.) *cert. dismissed*, 474 U.S. 1113 (1985). *Compare Jewett v. Commissioner*, 455 U.S. 305, 318 (1982) (consistent interpretation of Internal Revenue Code by Commissioner is entitled to "respect").

CONCLUSION

Based on the foregoing, the American Society of Pension Actuaries respectfully urges the Court to affirm the decision below and ensure that retirement plan assets provide retirement benefits.

Respectfully submitted,

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